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IN THE

# Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES, and TRICON TIMBER LLC,

*Petitioners,*

*v.*

ECOLOGY CENTER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, or the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), impose on the U.S. Forest Service a procedural requirement to conduct long-term, on-the-ground research to definitively conclude there will be beneficial effects to wildlife from thinning trees in old growth stands before deciding to conduct such a project to improve forest health, reduce the risk of wildfire and safely reintroduce prescribed fire?

2. Does the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, impose on the U.S. Forest Service a procedural and substantive requirement to collect on-site soil data for every timber harvest unit before it completes the final environmental impact statement?

3. Does the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), impose a "mandate to maintain wildlife viability" on the U.S. Forest Service?

## PARTIES TO THE PROCEEDINGS

The petitioners in this case are Mineral County, Town of Superior, St. Regis School District, Superior School District No. 3, Montana Coalition of Counties and Tricon Timber LLC. Respondent is the Ecology Center, Inc. The federal defendants in this case are Deborah Austin, in her official capacity as Forest Supervisor for the Lolo National Forest, Abigail Kimbell, Regional Forester of Region One of the U.S. Forest Service, and the United States Forest Service, an agency of the U.S. Department of Agriculture. They are being served as respondents herein.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The only corporate petitioner in this case, Tricon Timber LLC, states that it does not issue shares to the public and has no parent companies.

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Mineral County, Town of Superior, St. Regis School District, Superior School District No. 3, Montana Coalition of Forest Counties and Tricon Timber LLC (collectively "Mineral County") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 430 F.3d 1057. The opinion of the district court (App., *infra*, 40a-53a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on May 16, 2006 based upon an opinion of the court filed on December 8, 2005. App. 38a. A petition for rehearing and rehearing *en banc* was denied on May 8, 2006. App. 54a. On August 1, 2006, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including September 7, 2006. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

This case involves three statutes: (1) the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), which authorizes a court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and (3) the

National Forest Management Act ("NFMA"), 16 U.S.C. § 1604(g)(3), which directs the Secretary of Agriculture to promulgate regulations:

> specifying guidelines for land and resource management plans developed to achieve the goals of the [Resources Planning Act] Program which — (B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan.

## STATEMENT

1. This case arises from Forest Service resource management decisions following wildfires on the Lolo National Forest in Montana that burned approximately 74,000 acres in 2000. App., *infra*, 3a. The Forest Service prepared an environmental impact statement ("EIS") for the Post Burn Project to evaluate salvage and restoration of the burned and unburned areas in the vicinity of the wildfires. *Id.* The Forest Service completed the Final EIS and Record of Decision for the Lolo National Forest Post Burn Project in July 2002. *Id.*

2. As part of the project, the Forest Service decided to salvage burned timber and to treat unburned old growth forest stands by commercially thinning small-diameter trees and

by prescribed burning. *Id.* at 3a; 27a. The objective was to improve the forest health of the old growth stands, minimize the risk the stands would be destroyed by a wildfire, and safely reintroduce prescribed fire. *Id.* at 6a; 27a; 34a-35a. Many of the old growth stands in the project area were threatened by insects and disease and had been destroyed by the wildfires that occurred in 2000. *Id.* at 34a-35a.

3. To evaluate the salvage of dead trees, the Forest Service completed a field sampling of soils in the project area. *Id.* at 18a-19a; 29a. The soils were sampled in areas where the fires had burned, with some samples located inside proposed harvest units and other samples located outside the units. *Id.* A regional soil protection standard precluded ground-disturbing activities where soil disturbance would exceed 15% of a harvest unit. *Id.* at 18a. The Forest Service relied on the field soil samples to conclude that the harvest units currently did not exceed the 15% standard. *Id.* at 22a; 29a-31a. The Forest Service also adopted a mitigation measure that supplemented the field samples and required an on-the-ground examination of the units prior to timber harvest to confirm that the soil standard would be satisfied. *Id.* at 24a-25a; 32a.

4. The district court concluded that "the record demonstrates that the Lolo National [Forest] took the requisite hard look at the impacts of the project on both the animal species at issue, and on old growth and soil conditions." *Id.* at 49a. The Court also noted that:

> The Post Burn Project evaluates current and historical soil conditions on the Lolo National Forest and identifies the predicted impacts of the

> Project on those conditions. FEIS 3-31 - 32; 3-35-48. Further the Forest Service proposed mitigation and monitoring plans to follow up on the results of the project. FEIS 2-36; 2:41-42; 2:61-62.

*Id.* Finally, the district court concluded that:

> Plaintiff repeatedly disputes management decisions of the Forest Service, including what Plaintiff sees as the Forest Service's misguided fire policy, the Forest Service's approach to old growth habitat management (Br., 8-9), and the LNF's choice of scale for its consideration of soils impacts (Br., 20), among other things. This Court is not in a position to settle scientific disputes.

*Id.* at 50a.

5. A divided panel of the Court of Appeals reversed. *Id.* at 1a-25a. Judges Fletcher and Gould, writing for the majority, held that the Forest Service was arbitrary and capricious in its decision to thin the small trees from old growth stands to improve forest health, minimize fire risk, and reintroduce fire into those stands through prescribed burning because the agency was not reasonably certain the treatment would not harm old growth wildlife. *Id.* at 6a-12a. The majority characterized the Forest Service's conclusion that the treatments would benefit old growth stands and wildlife as an "unverified hypothesis" that had to be confirmed through clinical trials before the Forest Service could manage the forest in the way it proposed. *Id.* at 9a.

6. In dissent, Judge McKeown criticized the majority's characterization of treating old growth stands as an "unverified hypothesis." *Id.* at 33a. The dissent explained that the Forest Service's assumptions were supported by observational data, *id.*, and further noted that:

> the status quo is anything but stable. The Forest Service presents uncontested evidence that the failure to treat old-growth areas risks the very harms feared by Ecology Center, even though it has provided no evidence to support such a claim. Op. at 16038 ("Ecology Center does not offer proof that the proposed treatment causes the harms it fears. . . ."). In fact, the record reveals that the failure to treat old-growth areas could result in "considerable loss of old growth trees from bark beetle predation," which will put "at risk . . .specific habitat niches for many wildlife species that are adapted to the more open growth old-forest character." Old-growth areas "are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires." Inaction or delay threatens the species Ecology Center seeks to protect.

*Id.* at 34a-35a.

8. The majority also held that the Forest Service's assessment of soils using a sample of soil conditions and verification of those conditions on each harvest unit before allowing harvest to proceed did not comply with NEPA. *Id.* at 22a-25a. Instead, the majority concluded that the Forest Service could only satisfy NEPA by field testing the soil in every proposed harvest unit before completing the EIS. *Id.* at 24a-25a.

9. The dissent questioned whether the majority could draw from NEPA an "'on-site soil analysis' doctrine." *Id.* at 32a. The dissent concluded that the Forest Service adequately sampled soils and that the majority improperly required the agency to visit every harvest unit before deciding on a course of action, noting that the majority improperly "changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." App. 28a.

## REASONS FOR GRANTING THE PETITION

This case is about the Ninth Circuit Court of Appeals' overly expansive view of the requirements of NEPA and NFMA. By misconstruing the requirements of NEPA and NFMA, the Ninth Circuit has made it increasingly time consuming, expensive, and difficult for the United States Forest Service to apply its professional expertise and discretion in managing natural resources on the national forests in western states. The Ninth Circuit's application of NEPA and NFMA to natural resource management decisions is particularly important because the Circuit encompasses about 452 million acres of public lands, which represents about 60% of all federally-owned land in the United States.

The Ninth Circuit, more than any other court of appeals, has difficulty applying the APA's deferential arbitrary and capricious standard of review in the context of NEPA. This Court has corrected the Ninth Circuit's expansive view of NEPA's requirements in the past and should do so again. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353-59 (1989) (reversing Ninth Circuit determination that NEPA required an agency to include a fully-developed mitigation plan and a worst case analysis in an EIS); *Marsh*

*v. Oregon Natural Resources Council*, 490 U.S. 360, 375-77, 385 (1989) (reversing Ninth Circuit determination that an agency's decision not to supplement an EIS was reviewed under a reasonableness standard instead of the arbitrary and capricious standard of review, and also reversing Ninth Circuit determination that the agency erred by failing to supplement its EIS); *Department of Transp. v. Pub. Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 2214-17, 2218-19 (2004) (reversing Ninth Circuit determination that an agency needed to prepare an EIS to consider the environmental effects of Mexican motor carriers entering into the U.S. where the agency lacked discretion to prevent such entry). This Court also has cautioned that even in the context of NEPA, the concept of federalism constrains judicial review because a court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Once again, the Ninth Circuit needs to be reminded of the need for constraint.

The Court also should review the Ninth Circuit's conclusion that NFMA imposes on the Forest Service a "mandate to maintain wildlife viability." The term "wildlife viability" is not found in NFMA. Rather, NFMA directs the Forest Service to "provide for plant and animal diversity." 16 U.S.C. § 1604(g)(3)(B). The Ninth Circuit's position is contrary to the Seventh Circuit which has concluded that the diversity provision of NFMA does not establish a substantive standard that elevates wildlife management above management for other resources or that limit the Forest Service's discretion to manage the national forests.

In this case, the Circuit imposed procedural and substantive requirements in the name of NEPA and NFMA that are found neither in the statutes nor their implementing regulations..The decision presents an important federal question about management of the fire-prone forests in the west and conflicts with this Court's opinions which have emphasized that NEPA is a procedural statute that does not dictate substantive environmental results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The end result of the majority's misinterpretation of the law was to place the court in the impermissible role of decisionmaker. The dissent summarized the problem thusly:

> The Ninth Circuit, like other circuits, repeats frequently the legal mantras of administrative review in the context of environmental decisions: "arbitrary and capricious," "hard look," and "no second guessing." These standards are easy to articulate, but it is more difficult to know when we have cross the line from reviewer to decisionmaker. In this case, we have gone too far.

*Id.* at 26a. The Court's review is warranted to affirm for the Ninth Circuit that it cannot impose additional procedural or substantive requirements not found within NEPA or NFMA as a prerequisite for agency forest resource management decisions.

The Ninth Circuit would have the Forest Service fiddle with analysis having no statutory basis while the national forests of the west burn. The Forest Service wants to thin smaller trees from old growth stands and reintroduce prescribed fire to protect the stands from uncontrolled wildfire which is an increasingly significant threat to the

forests in the west.[1] However, the Ninth Circuit would have the Forest Service conduct clinical trials regarding the effects of such land management before taking action to protect old growth stands. It would take decades for the Forest Service to conduct clinical trials in an effort to determine the "definitive" effects on wildlife of thinning and prescribed burning in old growth stands. *See Daubert v. Merrell Dow*, 509 U.S. 579, 590 (1993) (pointing out that "arguably, there are no certainties in science"). The Forest Service does not have this luxury of time given the imminent threat of wildfire, and neither NEPA nor NFMA demand the "verified

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1. This issue is of profound importance throughout the western United States but of particular import to petitioners, who are from Montana. Montana wildlands are the most at risk to wildfire from changes in climate. Donald McKenzie et al., *Climatic Change, Wildfire, and Conservation*, 18 Conservation Biology 890, 894 (2004) ("Montana is the most sensitive, with a 50-fold increase in mean area burned over the observed range in climate."). Montana currently is suffering through another major fire season, with the Derby Fire alone having burned over 180,000 acres and destroyed 26 homes. *http://www.inciweb.org/incident/440/* (last visited September 6, 2006). In August 2006, the Journal of Science published two articles discussing the increasing threat of major wildfires in association with climate change. Steven W. Running, *Global Warming Causing More, Larger Wildfires?*, 313 Science 927 (2006); A.L. Westerling et al., *Warming and Earlier Spring Increase Western U.S. Forest Wildfire Activity*, 313 Science 940, 943 (2006) ("The overall importance of climate and wildfire activity underscores the urgency of ecological restoration and fuels management to reduce wildfire hazards to human communities and to mitigate ecological impacts of climate change in forests that have undergone substantial alterations due to the past land uses."). The increase in wildfires is undisputed, and reducing stand density to protect old growth stands from such fires is one of the Forest Service's highest priorities. *See generally* Healthy Forest Restoration Act of 2003, 16 U.S.C. §§ 6501-91.

hypothesis" approach as a predicate to resource management as articulated by the majority.[2]

This case also is of national importance because the Lolo Post Burn Project was designed to reduce hazardous fuels in old growth stands in response to the National Fire Plan. Supplemental Excerpts of Record ("SER") 43. The National Fire Plan arose from the devastating wildfire season of 2000 when then-President Clinton directed the Secretaries of Agriculture and Interior to develop a response to severe wildfires and reduce fire impacts on rural communities. A Collaborative Approach for Reducing Wildland Fire Risk to Communities and the Environment, available at *http://www.fireplan.gov/reports/7-19-en.pdf* (last visited September 5, 2006). Congress subsequently directed the Secretaries of Agriculture and Interior to identify communities within the vicinity of federal lands that are at high risk for wildfire. Department of Interior and Related Agencies Appropriations Act 2001, Pub. L. No. 106-291, 114 Stat. 921, 1009 (2000). The Secretaries identified more than 9,000 at-risk communities near federal lands managed by the Department of Agriculture. 66 Fed. Reg. 43384 (August 17, 2001). Among these at-risk communities was petitioner Superior, Montana. *Id.* at 43409. It is vitally important to the communities of the west that the Forest Service not be second guessed by the courts in exercising its discretion to reduce hazardous fuels on the nationals forests.

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2. The Forest Service has a division that conducts forest management research, and the long term effects of fuel reduction are being studied by Forest Service research stations. *See Wildland Fire and Fuels Research and Development Strategic Plan: Meeting the Needs of the Present, Anticipating the Needs of the Future*, Research and Development Publication FS-854, June 2006, available at *http://www.fs.fed.us/research/pdf/Wildland_book.pdf* (last visited September 5, 2006).

**1. The Ninth Circuit erred in holding that NEPA and NFMA impose a procedural requirement on federal agencies to complete on-the-ground research in support of natural resource management decisions before taking action.**

The majority's nondeferential and distrustful approach to reviewing the Forest Service's land management decisions represents a significant departure from this Court's holding that deference should be at its maximum when reviewing agency decisions involving "an unverified hypothesis" at the frontiers of science. *Baltimore Gas & Elect. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983) (a reviewing court should "be at its most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science"). In reviewing the Forest Service's decision to thin dense understory trees to improve forest health, reduce the risk of wildfire, and safely reintroduce fire into old growth stands, the majority imposed a scientific knowledge requirement not found in NEPA, NFMA, or the APA. Citing clinical trials associated with drug studies as an example, the majority contended that the Forest Service must test its theories with on-the-ground research before it can act. App. 9a. *Cf.* App., *infra*, 35a-36a (criticizing the imperfect analogy of drug studies to forest land management) (McKeown, J., dissenting).

The Forest Service based its land management decision for the Lolo Post-Burn Project on the current state of scientific knowledge, particularly focusing on changes in old growth habitat. Although the majority assumed that designated old growth was a static habitat, such that it needed to be preserved from "invasive" Forest Service land management activities, *id.* at 9a-10a, the EIS explained the

Forest Service's reasonable concerns that absent treatment, old growth would be lost to bark beetle attack and high-severity stand-replacing wildfires. *See id.* at 34a-35a (noting that the "status quo is anything but stable," and that the Forest Service had put forth uncontroverted evidence that inaction threatened old growth habitat and associated species) (McKeown, J., dissenting). The Forest Service was not crying wolf, as the burned portions of the project area had lost hundreds of acres of old growth to wildfire. SER 217-19. Even assuming the old growth habitat was somehow impervious to insects or fire, the ponderosa pine, western larch, and Douglas-fir old growth trees in the overstory were being threatened by invasive and competing shade tolerant fir species, a process that would detrimentally alter the character of the old growth stands over time. SER 211-12.

Contrary to the majority's determination that the Forest Service was "altering the composition of old-growth habitat through an invasive process," app. 10a, the Forest Service's objective was not to remove old growth habitat but rather to create, maintain, and improve that habitat. SER 148 ("No live old growth trees . . . would be harvested or cut. *All* live old growth trees would be retained for biodiversity, legacy, and habitat.") (emphasis added). All trees that met old growth criteria in harvest units were to be retained. *Id.* However, the majority ignored the fact that the limited treatment would not convert old growth stands to non-old growth stands.[3] Instead, the majority concluded that the Forest Service should have ignored the various identified threats to old growth,

3. The proposed prescribed fire would have removed most trees less than three inches in diameter while leaving large, older trees intact. SER 239. The proposed thinning would have removed smaller, invasive shade tolerant species while retaining large ponderosa pine, western larch, and Douglas-fir. SER 157.

which as the dissent noted, would have been in itself arbitrary and capricious. App., *infra*, 35a (McKeown, J., dissenting).

The majority believed that the Forest Service's conclusion that prescribed fire and thinning would help create, maintain, and improve old growth conditions was an "unverified hypothesis" pulled from thin air. However, the Forest Service through its annual forest plan monitoring and evaluation had reviewed the beneficial effects of prior timber sales in old growth. SER 41-42. The Forest Service also had conducted a detailed analysis of the effects of treating old growth on other timber sales which demonstrated that thinning and prescribed burning helped restore the forest to an historic old growth structure that was more sustainable and resilient in the face of natural disturbances such as insects and wildfire. SER 693; SER 849-55. In contrast to the Forest Service's evidence regarding the benefits of treating old growth habitat, Ecology Center did not offer a scintilla of evidence that such action harmed old growth or old growth dependent species on the Lolo National Forest. App., *infra*, 7a ("Ecology Center does not offer proof that the proposed treatment causes the harm it fears. . . ."); 34a. Thus, there is no support for the majority's decision to invalidate the Forest Service's factually-supported decision by imposing a NEPA or NFMA procedural requirement of conclusive research prior to agency action.

**2. By dictating the timing and extent of field surveys to verify soil conditions, the Ninth Circuit improperly imposed procedural and substantive requirements not found in NEPA.**

The majority wrongly concluded that to satisfy the requirements of NEPA, the Forest Service must field verify soil conditions on all harvest units before completion of the EIS. App., *infra*, 22a-25a. Thus, the Ninth Circuit found in NEPA a substantive requirement to field verify soils on every harvest unit, and a procedural requirement to do so before completing the final EIS. The decision conflicts with this Court's precedent holding that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act," *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 548 (1978) (citing *Kleppe v. Sierra Club*, 420 U.S. 390, 405-06 (1976)), and that NEPA imposes no substantive requirements upon an agency. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

At issue in this case was the requirement that no timber harvest occur in an "activity area" or harvest unit that exceeded 15% detrimental soil conditions. App., *infra*, 18a. Contrary to the majority's opinion, knowledge of the soil condition of each and every proposed harvest was not necessary for the Forest Service to make a reasoned choice among alternatives about how best to minimize soil disturbance. To avoid timber harvest on any activity area that exceeded 15% detrimental soil disturbance, the Forest Service planned to examine every harvest unit in the project's sale area before commencing timber harvest. App., *infra*, 24a. The majority belittled the Forest Service's approach as a "decision to authorize the Project first and verify later," and

it held that to satisfy NEPA, the Forest Service was required to visit every proposed harvest unit for every alternative considered in the EIS before the EIS was completed. *Id.* at 25a. This holding runs afoul of NEPA for two reasons.

First, the majority's holding established a substantive soil data collection rule not found in NEPA. As the dissent explained, "we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality of that analysis – even in the absence of contrary scientific evidence in the record." App. 29a-30a.

Second, the majority improperly imposed a procedural rule that soil data must be collected on all potential harvest units before the EIS is complete. The majority's conclusion that the Forest Service may not "authorize a project first and verify later" is fundamentally at odds with the concept of mitigation under NEPA which allows an agency to adopt measures to avoid an impact by not implementing certain parts of an action. 40 C.F.R. § 1508.20(a). For example, the Forest Service commonly establishes riparian buffers in units to protect streams before implementing timber harvest and delineates the riparian protection zones in the field *after* approval of the EIS but before implementation of the project. The 15% detrimental soil disturbance restriction is essentially a mitigation measure designed to protect soil. Indeed, NEPA's implementing regulations define "mitigation" as "(a) Avoiding the impact altogether by not taking a certain action or parts of an action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation." 40 C.F.R. § 1508.20. The panel's decision thus conflicts

directly with the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), which cautioned that:

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other . . . it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

*Id.* at 352-53. The majority was not free under NEPA to impose on the Forest Service its own view of the appropriate procedural steps to address the impacts on soils. There was no legal infirmity inherent in the Forest Service's procedural approach to survey some areas before the EIS was final, adopt a mitigation measure requiring field verification of the soil conditions on each selected harvest unit, and then follow up with a visit to the harvest units before project implementation.

**3. The Ninth Circuit erred in finding that NFMA contains a wildlife viability mandate that transcends the congressionally-declared multiple uses of the national forests, and its decision is in conflict with the Seventh Circuit.**

The majority's conclusion that the statutory language of NFMA embodies a viability mandate – one that cannot be satisfied unless the Forest Service definitively determines through research that the effects of removing small trees in old growth forest will benefit wildlife viability – conflicts with NFMA and the decision of the Seventh Circuit Court of Appeals in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995).

The majority erroneously stated that NFMA contains a mandate to maintain wildlife viability:

> In providing for multiple uses, the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest. . . ." *Idaho Sporting Congress*, 305 F.3d at 961; 16 U.S.C. § 1604(g)(3)(B). In addition to *the mandate to maintain wildlife viability*, the Forest Service must maintain soil productivity. 16 U.S.C. § 1604(g)(3)(C).

App., *infra*, 6a (emphasis added). *See also id.* at 8a (referring to a viability mandate in discussing the Ecology Center's position that the Forest Service was arbitrary because it was not "reasonably certain that treating old-growth is consistent with NFMA's substantive mandate to ensure species diversity and viability"). The majority then held that because the Forest

Service did not conduct formal research regarding the effects on wildlife of commercial thinning and prescribed burning in old growth forests, the agency's assumptions about the effects of thinning and burning on wildlife were arbitrary and capricious in light of NFMA's supposed viability mandate. *Id.* at 10a-11a.

NFMA's statutory language simply does not contain a mandate to maintain wildlife viability, let alone a viability mandate that trumps all other multiple-use considerations. Rather, the section of the statute referenced in the panel opinion, see *id.* at 6a, merely requires the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B).[4] Multiple-use objectives include the production of timber.[5]

The NFMA's diversity language in section 1604(g)(3)(B) not only contains no wildlife viability requirement, it also is so qualified that "it is difficult to discern any concrete legal

4. The majority also cited to an earlier Ninth Circuit decision for the proposition that NFMA contains a viability mandate. App. 5a-6a (citing to *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002)). However, a careful reading of that case reveals that in *Rittenhouse*, the Ninth Circuit found a viability "mandate" in a since-eliminated NFMA implementing regulation, not in the statute itself. *Rittenhouse*, 305 F.3d at 961-62 (relying on 36 C.F.R. 219.19 (1999), which provided that "wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area").

5. The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31, imbued the Forest Service with abundant discretion to decide the priorities for management of the national forests.

standards on the face of the provision." Charles F. Wilkinson & H. Michael Anderson, *Land & Resource Planning in the National Forest*, 64 Or. L. Rev. 1, 296 (1985). Further, the majority's discovery of a substantive wildlife viability mandate in 16 U.S.C. § 1604(g)(3)(B) directly conflicts with the Seventh Circuit's interpretation of NFMA, which declined to find a substantive requirement in the statute's diversity provision. *Sierra Club*, 46 F.3d at 620. *See also Glisson v. U.S. Forest Serv.*, 876 F. Supp. 1016, 1029 (S.D. Ill. 1993) (same), *aff'd*, 51 F.3d 275 (7th Cir. 1995). The Fifth Circuit also has addressed the issue, noting that the so-called "diversity mandate itself has been the subject of considerable debate." *Sierra Club v. Espy*, 38 F.3d 792, 801 (5th Cir. 1994). Respectfully, it is time for this Court to resolve this important debate.

More than a decade ago, the Forest Service in a proposal to amend its rule for land and resource management planning on the national forests acknowledged that "the interpretation of the NFMA diversity provision as a goal rather than a concrete standard" was supported by NFMA's legislative history and relevant judicial opinions. 60 Fed. Reg. 18886, 18892 (April 13, 1995). Rather than creating a substantive diversity standard, section 1604(g)(3)(B) directs the Forest Service to "provide for" diversity in order to meet multiple-use objectives. Thus, regardless of whether the majority's wildlife viability holding was premised under the former viability regulation or the statute itself, the majority erred in elevating wildlife viability above all other multiple-use considerations contrary to the explicit language of Congress in the NFMA.[6]

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6. While this Court has held that the Endangered Species Act imposes heightened obligations to protect endangered species, *see generally TVA v. Hill*, 437 U.S. 153 (1978), endangered species were not at issue in the Forest Service's management of old growth habitat, and the Ecology Center advanced no Endangered Species Act claims.

## CONCLUSION

The Court should grant Mineral County's petition for writ of certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMER 8, 2005**

**UNITED STATES COURT OF APPEALS**
**NINTH CIRCUIT**

No. 03-35995

D.C. No.
CV-03-00018-DWM

ECOLOGY CENTER, INC.,

*Plaintiff-Appellant,*

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

*Defendants-Appellees,*

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT NO. 6; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER,

*Defendant-Intervenors-Appellees.*

*Appendix A*

Argued and Submitted
February 14, 2005–Seattle, Washington

Filed December 8, 2005

Before: Betty B. Fletcher, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge McKeown

## OPINION

B. FLETCHER, Circuit Judge.

Ecology Center, Inc. ("Ecology Center") challenges the United States Forest Service's ("Forest Service" or "Service") Lolo National Forest Post Burn Project ("Project"), which was designed in the aftermath of the 2000 wildfires on the Lolo National Forest ("LNF"). Ecology Center raises a number of procedural and substantive claims under the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find that the Forest Service's decision to permit logging in critical old-growth forest and post-fire habitats was arbitrary and capricious, we reverse the grant of summary judgment to the Service and remand.

*Appendix A*

I

In 2000, wildfires burned approximately 74,000 acres on the Lolo National Forest. While the fires caused considerable damage to the forest, they also created habitat for species that are dependent upon post-fire habitats, such as the black-backed woodpecker.

In response to the 2000 fires, the Forest Service began developing the Lolo National Forest Post Burn Project and preparing the requisite Environmental Impact Statement ("EIS"). The Forest Service considered four alternatives in detail, including a "no action alternative." In July 2002, the Forest Service selected a slightly modified version of "Alternative Number Five" for the Project. This alternative involves, *inter alia*, commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber in various areas of the forest.

On February 7, 2003, Ecology Center filed its complaint, raising several claims under NEPA and NFMA. Ecology Center objects to the Forest Service's decision to permit commercial logging in old-growth forest stands, raising concerns about the impact of such logging on the viability of species that are dependent upon old-growth habitat, such as the pileated woodpecker and the northern goshawk. Similarly, Ecology Center questions the Service's impact analysis of salvage logging in post-fire habitat, particularly with respect to the black-backed woodpecker, a sensitive species. Ecology Center also raises concerns regarding the impact of the Project on soil conditions and questions the reliability of the Service's soil quality analysis.

*Appendix A*

Ecology Center moved for a temporary restraining order and preliminary injunction, both of which the district court denied. The parties then filed cross-motions for summary judgment. On November 4, 2003, the district court struck extra-record declarations that Ecology Center had included with its motion and granted summary judgment in favor of the Forest Service.[1]

II

"Because this is a record review case, we may direct that summary judgment be granted to either party based upon our

1. In separate proceedings, the Sierra Club challenged the same project at issue here. The district court ruled in favor of the Sierra Club's claim that the Forest Service was required to determine how much sediment affected streams could assimilate before implementing the Project, but ruled in favor of the Forest Service with respect to its analysis of the Project's impact on unroaded areas. In a memorandum disposition decided December 2, 2003, we reversed the district court on both claims: we found that the Forest Service's assessment of the Project's effect on water quality satisfied NEPA, but that its analysis of the Project's impact on unroaded areas was inadequate. *Sierra Club, Inc. v. Austin*, 82 Fed.Appx. 570 (9th Cir.2003). The case was remanded to the district court, and the parties then settled.

The Forest Service moved for this court to take judicial notice of the *Sierra Club* settlement agreement, and for leave to file supplemental information and declarations explaining the terms of the settlement; we granted that motion. After taking judicial notice of the settlement, we invited the parties to advise us as to whether the settlement moots any portion of this appeal or affects the relief, if any, that the district court should grant. Although the settlement significantly reduces the scope of the Project, neither party argues that Ecology Center's claims are moot.

de novo review of the administrative record." *Lands Council v. Powell*, 379 F.3d 738, 743 (9th Cir.2004), *amended by* 395 F.3d 1019 (9th Cir.2005). Our review of agency actions challenged under NFMA and NEPA is governed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir.1998); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir.2003). Under the APA, we review to determine if the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Lands Council*, 379 F.3d at 743.

NFMA imposes both substantive and procedural requirements on the Forest Service. 16 U.S.C. §§ 1600-1687. Procedurally, it requires the Forest Service to develop a land and resource management plan ("forest plan") for each forest that it manages. 16 U.S.C. § 1604(a). Subsequent agency actions must not only comply with NFMA but also be consistent with the governing forest plan. 16 U.S.C. § 1604(i); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 961-62 (9th Cir.2002) ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act. . . ."). NFMA also requires that the Forest Service adopt regulations specifying guidelines for the achievement of NFMA's substantive mandates. 16 U.S.C. § 1604(g)(3).

"In providing for multiple uses, the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the

*forest. . . .*" *Idaho Sporting Congress*, 305 F.3d at 961; 16 U.S.C. § 1604(g)(3)(B). In addition to the mandate to maintain wild-life viability, the Forest Service must maintain soil productivity. 16 U.S.C. § 1604(g)(3)(C).

Unlike NFMA, NEPA imposes no substantive requirements. Instead, it is designed "to force agencies to publicly consider the environmental impacts of their actions before going forward." *Idaho Sporting Congress*, 305 F.3d at 963. "Agencies must adequately consider the project's potential impacts and the consideration given must amount to a 'hard look' at the environmental effects." *Id.* Specifically, NEPA requires the preparation of a detailed Environmental Impact Statement. 42 U.S.C. § 4332(2)(C). An EIS must "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

*A. "Treatment" of Old-Growth Habitat*

The Project involves what the Forest Service characterizes as rehabilitative "treatment" of old-growth (and potential old-growth) forest stands; this treatment entails the thinning of old-growth stands via commercial logging and prescribed burning. The Forest Service cites a number of studies that indicate such treatment is necessary to correct uncharacteristic forest development resulting from years of fire suppression. The Service also points out that the treatment is designed to leave most of the desirable old-growth trees in place and to improve their health.

*Appendix A*

Ecology Center highlights the scientific uncertainty and debate regarding the necessity, design, and long-term effects of such old-growth treatment. In particular, Ecology Center alleges that the treatment of old-growth forest harms species that are dependent upon old-growth habitat. For example, Ecology Center claims that, even if treatment leaves most old-growth trees in place, it removes or alters other essential elements within old-growth habitat and disturbs bird species currently nesting or foraging within targeted stands.[2] Although treatment may be designed to restore old-growth to "historic conditions," Ecology Center points out this can be a misleading concept: for example, information regarding historic conditions is incomplete; altering particular sections of forest in order to achieve "historic" conditions may not make sense when the forest as a whole has already been fundamentally changed; many variables can affect treatment outcomes; and the treatment process is qualitatively different from the "natural" or "historic" processes it is intended to mimic.

*1. NFMA*

While Ecology Center does not offer proof that the proposed treatment causes the harms it fears, the Service does not offer proof that the proposed treatment benefits-or at least

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2. For example, the pileated woodpecker is dependent upon old-growth snags (standing dead trees), but treatment involves timber harvesting, which "creates the potential for snag loss." Although the Service acknowledges this danger, it believes that proposed "snag mitigation measures," combined with the potential for snag-creation during the prescribed burning process, will offset most of the snag loss caused by logging.

does not harm-old-growth dependent species. Ecology Center argues that because the Forest Service has not assessed the effects of old-growth treatment on dependent species, the Service cannot be reasonably certain that treating old-growth is consistent with NFMA's substantive mandate to ensure species diversity and viability. As a result, especially given the scientific uncertainty surrounding the treatment of old-growth stands, the Forest Service's decision to treat additional old-growth stands was arbitrary and capricious.

Although the Forest Service points to a report which notes that two species of woodpecker were observed foraging in treated old-growth forest, it does not otherwise dispute the charge that it has not directly monitored the impact of treating old-growth on dependent species. Instead, the Service maintains that it need not do so because (1) it has observed the short-term effects of thinning old-growth stands via commercial logging and prescribed burning on forest composition, (2) it has reason to believe that certain old-growth dependent species would prefer the post-treatment composition of old-growth forest stands, and (3) its assumption that treatment does not harm old-growth dependent species is therefore reasonable. The Service further argues that we must defer to its methodological choices regarding what to monitor and how to assess the impact of old-growth treatment.

An agency's choice of methodology is entitled to deference. *See, e.g., Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir.1994). However, there are circumstances under which an agency's choice of methodology, and any decision predicated on that

methodology, are arbitrary and capricious. For example, we have held that in order to comply with NFMA, the Forest Service must demonstrate the reliability of its scientific methodology. *Lands Council*, 379 F.3d at 752 (holding NFMA "require[s] that the hypothesis and prediction of the model be verified with observation"). Here, as in *Lands Council*, the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis. While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any "on the ground analysis," *id.*, despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so. Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species. This is not a case in which the Forest Service is asking for the opportunity to verify its theory of the benefits of old-growth treatment. Rather, the Service is asking us to grant it the license to continue treating old-growth forests while excusing it from ever having to verify that such treatment is not harmful.

The Service argues that under *Inland Empire Public Lands Council v. U.S. Forest Serv.*, 88 F.3d 754 (9th Cir.1996), we must defer to its decision to monitor only the effect of treatment on forest composition, instead of also monitoring the effect of treatment on dependent species. However, *Inland Empire* is inapposite here. In that case, we

permitted the Service to determine that it was complying with its duty to maintain species viability by using a "proxy-on-proxy" method for monitoring species population. *Id.* at 761. *But see Idaho Sporting Congress*, 305 F.3d at 972-73 (finding use of proxy-on-proxy approach arbitrary and capricious where there is evidence that the "methodology does not reasonably ensure viable populations of the species at issue"). Under the proxy-on-proxy approach, the Service does not ensure that it is maintaining species viability by directly monitoring species populations. Instead, the Service designates certain "management indicator species" as proxies for other species with comparable habitat needs. It then designates certain kinds of habitat as proxies for the management indicator species. Finally, it assumes that a species' viability is maintained so long as the requisite amount of the species' habitat is maintained. Here, the Service is not simply maintaining the amount of old-growth habitat necessary to support old-growth dependent species-it is altering the composition of old-growth habitat through an invasive process.

Although the Service concedes that the opinions of well-qualified experts vary with respect to the appropriateness of management activities in old-growth areas, it also argues that it must have the "discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). However, this is not a case in which different experts have studied the effects of commercial thinning and prescribed burning in old-growth forests and reached different conclusions. Here, experts have

differing hypotheses regarding the effects that treating old-growth has on dependent species, yet the Forest Service proposes to continue treating old-growth without first taking the time to observe what those effects actually are. In light of its responsibilities under NFMA, this is arbitrary and capricious.

*2. NEPA*

"The EIS did not address in any meaningful way the various uncertainties surrounding the scientific evidence" upon which the decision to treat the Lolo National Forest old-growth rests. *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir.1993). Although the EIS identifies the public's concerns regarding the impact of treatment on dependent species as "key" or "driving" issues,[3] the EIS does

3. In a section of the EIS entitled "Issue Development," the Service describes "[p]otential issues," which are "defined as actual and perceived effects, risks, and hazards of the Proposed Action." Issues were identified both internally and through "public involvement." In relevant part, the EIS states:

> There is a concern that the reduction of canopy closure and stand density caused by fuels reduction activities and commercial thinning may adversely affect habitat for several bird species that are dependent upon late-successional dry forests with closed canopies and high basal area.
>
> . . .
>
> There is a concern that the . . . commercial thinning of unburned trees, and the removal of understory fuels,

(Cont'd)

not actually explain in any detail the bases of those concerns, much less address them. *Cf. id.* (finding NEPA violation where Forest Service failed "to include a full discussion of the scientific uncertainty" surrounding its strategy for maintaining spotted owl viability). The EIS discusses in detail only the Service's own reasons for proposing treatment, and it treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis. Even if the Service considered these issues but concluded that it need not or could not "undertake further scientific study" regarding the impact of treatment on dependent species, it should have "explain[ed] in the EIS why such an undertaking [wa]s not necessary or feasible." *Id.* For these reasons, we also find that the Service's analysis of the impact of treating old-growth to be inadequate under NEPA.[4]

### *B. Salvage Harvesting of Black-Backed Woodpecker Habitat*

The Forest Service has designated the black-backed woodpecker as a "sensitive species," a species for which

(Cont'd)

> could adversely affect Proposed, Threatened, or Endangered Species and listed Sensitive, Threatened, or Endangered Species . . . known to be present within or to be potential to the analysis area.

4. Ecology Center also raises claims challenging the Service's analysis of the Project's impact on two specific old-growth dependent species, the pileated woodpecker and the northern goshawk. Because we find that the Service's decision to treat old-growth violates both NFMA and NEPA, we do not reach these more narrow claims.

viability is a concern. The black-backed woodpecker's viability is sensitive because it is particularly dependent upon post-fire landscapes, and the combination of fire-suppression efforts and past salvage logging has drastically reduced the amount of post-fire habitat. According to the EIS, "[d]ue to this reduction in habitat, black-backed woodpeckers went from being relatively abundant to relatively rare." To make matters worse, not all fires create black-backed woodpecker habitat, and the burned stands that do qualify only serve as black-backed woodpecker habitat for a limited number of years. As a result, new post-fire habitat must be continuously generated.

Ecology Center and the Forest Service agree that prior to the 2000 fires, there was a critical shortage of black-backed woodpecker habitat. Specifically, the Service estimated that from 1993 to 1998, fires created a total of 11,045 acres of post-fire habitat (9160 of those acres were burned in 1998 alone). This total was estimated to be 6% of what would have been created historically over a comparable six-year period. At that level, the Service considered the black-backed woodpecker and other post-fire habitat dependent species to be "at extreme risk."

Writing in November 2000 about the "effect [on] black-backed woodpeckers," Forest Service scientists explained: "We concluded in 1998 that salvage of any post-fire habitat on the Lolo [National Forest] . . . 'will impact individuals or habitat and with a consequence that the action may contribute to a trend towards federal listing or cause a loss of viability to the population or species.' " They explained that a small amount (less than 400 acres) of salvage could be permitted,

but only *if* there was "a commitment to creation of post-fire habitat of an equal amount" through prescribed fires. Under those two conditions, they believed that salvaging "would not likely . . . cause a loss of viability to the population," even though it "may impact individuals or habitat."

From the EIS, it appears that at the time the Project was developed, there was a total of 19,219 acres of black-backed woodpecker habitat in the Lolo National Forest: there were 9349 acres that were created by pre-2000 fires and were less than five years old, plus 9870 acres of habitat that were created by the 2000 fires. Of those acres, 9100 are located in the Project area. The selected alternative originally proposed salvage harvesting 1020 of those acres. However, the Record of Decision reduced that amount to 815 acres.[5]

The Forest Service maintains that the Project complies with NFMA because the 2000 fires created a large amount of potential habitat, and only a small portion will be salvaged. The Service further points out that the Project includes mitigation measures designed to minimize the adverse impact of salvaging.[6] However, "[r]esearch has also indicated that salvage logging, even when large numbers of snags are left, is detrimental to this species." For example, one study "found

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5. The *Sierra Club* settlement further reduced that amount to 155 acres.

6. For example, the Project provides that no harvesting will occur wherever black-backed woodpecker nests are located; each spring, before harvesting actually begins, targeted stands will be re-surveyed for black-backed woodpecker nests, and loggers will be instructed to preserve any identified nest trees as well as reserve patches surrounding the nesting trees.

that black-backed woodpeckers did not nest in areas that were considered lightly salvaged." In addition, the Project's mitigation measures do not provide for the creation of an equal amount of post-fire habitat elsewhere.[7]

*1. NEPA*

The EIS fails to adequately explain the basis for the Forest Service's conclusion that eliminating a portion of the newly-created habitat will not adversely affect the black-backed woodpeckers' viability. Prior to the 2000 fires, the amount of post-fire habitat was so low that the black-backed woodpecker and other post-fire habitat dependent species were deemed at "extreme risk," and Forest Service experts concluded that "salvage of any post-fire habitat . . . would . . . impact individuals or habitat . . . with a consequence that the action may contribute to a trend towards federal listing or cause a loss of viability to the population or species."[8] Yet, the Project EIS states-without meaningful explanation-that even though salvaging post-fire habitat may negatively impact individual black-backed woodpeckers, it will "not

7. Although other aspects of the Project involve prescribed burning, "the Lolo prescribed fire program has not demonstrated an ability to recruit large amounts of post-fire habitat, although there is an improving trend in 1997-98." Most kinds of prescribed burning do not create the necessary post-fire habitat; only higher-intensity fires create post-fire habitat. There is no indication that the kind of prescribed burning that the Project entails is designed to create black-backed woodpecker habitat.

8. As noted above, these experts concluded that some salvaging could be tolerated, but only if limited to a small amount and mitigated by the creation of an equal amount of post-fire habitat elsewhere.

likely result in a trend towards federal listing." Without more, this general statement regarding the possible impact and risk involved "do[es] not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; 40 C.F.R. § 1502.1 (providing that the EIS "shall be supported by evidence that the agency has made the necessary environmental analyses").

We can discern from the EIS only one possible basis for the Service's changed assessment of the impact of salvaging: the fact that the 2000 fires created additional post-fire habitat, which raised the total amount of post-fire habitat. However, we cannot conclude from this fact alone that the habitat level is no longer critically low and that the previously prescribed restrictions on salvaging should no longer be enforced.[9] To be reasonably certain that the post-Project habitat levels would be sufficient to ensure species viability, one must know where the threshold between "critical" and "sufficient" levels of burned habitat lies. Because the EIS does not disclose what this threshold is, much less explain how the threshold was determined, we cannot evaluate the Service's decision. Indeed, we cannot even be certain that the Service determined and considered this factor when making its assessment.

Similarly, the EIS does not indicate how much further habitat levels have to drop before the species is downgraded

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9. We note that the Service considered the creation of 11,045 acres of post-fire habitat over a six-year period to be critically low (6% of the historic rate); thus, the creation of 19,219 acres over a comparable period does not necessarily represent a sufficient increase.

from sensitive to threatened or how the Service plans to generate additional black-backed woodpecker habitat to counter-balance losses from salvaging, the passage of time, and ongoing fire-suppression efforts. Where, as here, "the information in the . . . EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide 'a reasonable, good faith, and objective presentation of the subjects required by NEPA.' " *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir.1988) (quoting *Johnston v. Davis*, 698 F.2d 1088, 1095 (10th Cir.1983)), *amended by* 867 F.2d 1244 (9th Cir.1989); *see also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998) ("[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

Thus, we hold that the Forest Service failed to either adequately explain its impact assessment or provide the information that is necessary to understand and evaluate the Forest Service's decision to permit salvaging of the black-backed woodpeckers' rare habitat, in violation of NEPA.

*2. NFMA*

The designation of a species as sensitive arises from the Forest Service's obligations under NFMA. Pursuant to

16 U.S.C. § 1604(g)(3)(B), the Forest Service is required to "provide for diversity of plant and animal communities." The Forest Service's duty to maintain viable populations "applies with special force to 'sensitive' species." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 n. 2 (9th Cir.2000) (citation and quotation omitted). The Lolo National Forest Plan requires, more specifically, that the Forest Service "manage to maintain population viability" for plant and animal species "that are not threatened or endangered, but where viability is a concern (*i.e.*, sensitive species)."

Because the Forest Service failed to provide the factual basis for its analysis and failed to adequately explain its decision, we cannot be reasonably certain that the salvaging-which the Service concedes may harm individual black-backed woodpeckers-will not jeopardize the black-backed woodpeckers' viability. *Cf. Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir.2005) (finding NFMA violation where "we cannot reasonably determine that the Forest Service has complied with the [Forest] Plan"). We therefore hold that the decision to salvage harvest black-backed woodpecker habitat is also arbitrary and capricious under NFMA.

*C. Soil-Quality Analysis*

Ecology Center next challenges the Forest Service's soil quality analysis. Under the applicable Regional Soil Quality Standard, the Forest Service cannot allow an activity that would create detrimental soil conditions in fifteen percent of the activity area.[10] Ecology Center claims that the

10. An "activity area" is a unit of forest in which an activity, in this case salvage harvesting, is to take place; this Project proposes (Cont'd)

methodology the Forest Service used to determine what percentage of soil is in a detrimental state in each activity area was insufficiently reliable because the Service estimated soil conditions on the basis of maps, samples from throughout the Forest, aerial reconnaissance, and computer modeling, but did not verify those estimates by directly observing soil conditions in the activity areas.[11]

We addressed a nearly identical claim, involving the same Regional Soil Quality Standard, in *Lands Council.*[12]

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(Cont'd)

harvesting in approximately 128 different activity areas or "cutting units." The Regional Soil Quality Standard further provides that if fifteen percent or more of the activity area already has detrimental soil conditions, then the Project will not be permitted to make it worse. Rather, the Project should then aim to improve the soil conditions.

11. Specifically, the Service looked at maps to determine where damaging past activities ( *e.g.*, timber harvesting), jammer roads, firelines, and skid trails, as well as areas of high soil burn severity overlap with proposed activity areas. In addition, the Service input data from the Land Systems Inventory ("LSI") and the Burned Area Emergency Rehabilitation Report ("BAER Report") into models to generate estimates of the project's possible effects. The BAER Report was based on field reviews and helicopter flyovers, as well as "transect surveys" (an approved method of field observations). The LSI and BAER Report data was not collected for the purpose of determining compliance with the Regional Soil Quality Standards. Because the Project was developed after the BAER transect surveys were conducted, the transects did not cover the vast majority of the activity areas; only a few were crossed by coincidence.

12. Because *Lands Council* was decided after briefing, we ordered supplemental briefing.

*See Lands Council*, 379 F.3d at 752-53. In that case, "based on samples from throughout the Forest, and aerial photographs, the Forest Service estimated the quality of the soils in the Project area using a spreadsheet model." *Id.* at 752. We held that the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Id.* at 752-53. In so holding, we relied on the analysis of an earlier district court case, *Kettle Range Conservation Group v. U.S. Forest Serv.*, 148 F.Supp.2d 1107 (E.D.Wash.2001), where the Forest Service, "based on assumptions [from general data from the Forest soils], geological maps, and aerial photographs, . . . *estimated* the condition of each unit, tried to determine which units *might* exceed established standards, and *projected* potassium levels." *Id.* at 1127 (emphasis in original).

Although the methodologies in this case, *Lands Council*, and *Kettle Range* all appear to suffer from the same critical defect, the Forest Service argues that *Lands Council* is not controlling here. Specifically, the Service argues that the Regional Soil Quality Standard is not binding with respect to projects in the Lolo National Forest. In addition, the Forest Service argues that this case is factually distinguishable from *Lands Council* because, notwithstanding the non-binding nature of the Standard, the Forest Service completed sufficient on-the-ground verification of its soil quality estimates. We address each argument in turn.[13]

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13. The Forest Service also reiterates its argument that this court must defer to its choice of methodology and reliance on its own experts. This argument fails here for the same reason it did in *Lands*

(Cont'd)

## *Appendix A*

### *1. The Regional Soil Quality Standard*

The Forest Service argues that the Standard is not binding because it was never incorporated into the Lolo National Forest Plan, and although it was incorporated into the Forest Service Manual, this court has held that the Forest Service Manual does not have the independent force and effect of law. *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir.1996).

Even assuming, *arguendo*, that the Standard does not have the independent force and effect of law with respect to the Lolo National Forest, it would nonetheless be arbitrary and capricious for the Forest Service to ignore it because both the draft EIS and final EIS discuss the Standard as if it is binding and claim that the Service developed the Project in compliance with its provisions. Thus, even if we were to agree that the Standard is merely advisory, we would then be compelled to find that the draft EIS and final EIS are misleading in violation of NEPA. *See Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304 n. 3 (9th Cir.1994) (rejecting the argument that the Forest Service could treat the

(Cont'd)

*Council:* although this court is required to defer to agency expertise, the agency is not permitted to adopt and rely upon a methodology without reasonably verifying its reliability. *Lands Council*, 379 F.3d at 752 ("The Forest Service, granted appropriate deference, still does not demonstrate the required reliability of the spread sheet model.") Moreover, in this case, one of the Forest Service's own experts, Region Scientist John Nesser, called the Forest Service's soil analysis into question because it failed to assess soil conditions by field testing the actual activity areas-the exact reason that *Lands Council* deemed the Forest Service's methodology inadequate.

Interagency Grizzly Bear Guidelines as optional where the Fish and Wildlife Service made its "no jeopardy" conclusion contingent on adherence to the Guidelines); *Animal Def. Council*, 840 F.2d at 1439 (noting that a misleading EIS violates NEPA). Moreover, the purpose of the Standard is to ensure compliance with the substantive mandates of NFMA. The Forest Service does not explain how it can be certain that the Project complies with NFMA if the Project was not developed in accordance with the Standard.

*2. On-Site Verification of Soil Conditions*

First, the Service points to the transects it conducted during the BAER assessment of the 2000 fires' aftermath. However, during the Project development, one of the Service's own experts pointed out that the transects targeted burned areas, not proposed harvest units; as a result, most of the activity areas were *not* transected.[14] Thus, the BAER transects do not distinguish this case from *Lands Council*, where the Service similarly "did not test much of the activity area." *Lands Council*, 379 F.3d at 752, *as amended by* 395 F.3d at 1034.

Second, the Forest Service argues that its soil analysis is nonetheless sufficiently reliable because it utilized data from areas with ecological characteristics similar to the proposed harvest units. *Lands Council* expressly rejected this

14. This point is corroborated by the draft EIS, which states that "not all proposed harvest units were visited with line transects" and that "much of the [soil quality] determination was based on information from the transportation and timber shop with respect to past activities and regeneration level of the jamer [sic] roads."

same argument. *Id.* ("The Forest Service concedes that it did not test much of the activity area, but argues that because it tested similar soils within the Forest, and similar soils act the same way, then the methodology is sound."). We note that comments on the Project by the Service's own expert support this holding: Region Scientist Nesser argued that the Service's conclusions regarding soil conditions in the activity areas were "not credible" because the Service did not test the activity areas themselves, as the Standard requires.[15]

Third, the Service points to some informal field reports contained in the record, some of which indicate that a small percentage of the activity areas were observed directly.[16] The record provides little information that enables us to assess

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15. Specifically, Region Scientist John Nesser commented:

> The statement on page 3-35 [of the draft EIS] *that 'All proposed activity units are at 3 percent (detrimental disturbance) or less prior to any new activities'* is not credible, given fire effects and the effects of past timber harvest and road building activities. This is because transects were done in the various burned areas, rather than in proposed harvest or other activity units. The burned units are not the correct activity unit to use for post fire activities. . . . statements about meeting the 15 percent limits for detrimental disturbance are both irrelevant and wrong. Without using the correct activity areas for analysis, the cumulative effects assessment is not correct.

16. Some of the field reports cited by the Service actually say very little about soil conditions.

the reliability or significance of these reports; for example, we do not know the qualifications of the persons conducting the field review, the methodology utilized, or whether the field observations confirmed or contradicted the Service's estimates. Moreover, the final EIS repeatedly explains that the Service will conduct field testing to verify its estimates prior to any ground-breaking activities,[17] and there is no indication in the draft EIS or final EIS that the Forest Service actually consulted and relied upon any of the field reports it now cites when it was making its selection amongst the Project alternatives. Thus, we cannot conclude that these reports distinguish this case from *Lands Council.*

Finally, we consider whether the Service's plan to verify soil conditions in the activity areas after authorizing the Project, but before actually commencing harvesting activities, satisfies NFMA and NEPA. The fact that the Service plans to conduct on-site verification prior to any harvesting implies that even the Service recognizes that its soil-quality estimates need to be verified. Thus, we conclude that the Forest

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17. The final EIS explains that a "[w]alk through of the proposed harvest and burn units *will* be completed prior to the implementation of any ground disturbing activities in the activity units. The walk through *will identify the occurrence and percent of the activity area* with displacement, rutting, compaction, high burn severity, depth of organic matter, pedestaling, and slumping." (emphasis added). Similarly, throughout its discussion of the Project's impacts, the EIS repeatedly notes that it "will verify" the conclusions it reached regarding soil conditions by having "qualified soil specialists" conduct "field reviews" of the proposed activity units "to evaluate the percent detrimental condition prior to any ground disturbing activities."

Service's decision to authorize the Project first and verify later does not distinguish this case from *Lands Council*, and that the Project violates NFMA. We also conclude that the Service's plan to verify its estimates post-decision fails to satisfy NEPA, because "NEPA requires consideration of the potential impact of an action *before* the action takes place." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir.1990) (emphasis in original)); *Kettle Range*, 148 F.Supp.2d at 1127 ("They [the Forest Service] apparently planned to [field test] sometime in the future. They should have done it before they completed the FEIS. The failure to do so is a violation of NEPA because it shows that USFS did not give a 'hard look' at the effects of the Project on the soils in the analysis area.").

## III

The Forest Service's selection of Modified Alternative Number 5 for the Lolo National Forest Post-Burn Project violates both NEPA and NFMA. We reverse the district court's summary judgment in favor of the Forest Service, and direct the district court to enter summary judgment on behalf of Ecology Center. We remand this case to the Forest Service for further proceedings consistent with this opinion.[18]

**REVERSED and REMANDED.**

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18. We do not reach the evidentiary issue: whether the district court abused its discretion in excluding the extra-record expert declarations. We note that, in the course of the preparation of a new EIS on remand, the parties may submit the declarations and any other relevant information to be included as part of the administrative record.

*Appendix A*

McKEOWN, Circuit Judge, dissenting:

The Ninth Circuit, like the other circuits, repeats frequently the legal mantras of administrative review in the context of environmental decisions: "arbitrary and capricious," "hard look," and "no second guessing."[1] These standards are easy to articulate, but it is more difficult to know when we have crossed the line from reviewer to decisionmaker. In this case, we have gone too far.

As summarized in *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1376 (9th Cir.1998), we review agency actions "to determine if they were arbitrary or capricious, an abuse of discretion, or not in accordance with law." The limited nature of this inquiry underscores the latitude in implementation and interpretation that Congress intended for its agents. This latitude does not relieve us of our duty to insure that the agency took a "hard look," as required under the National Environmental Policy Act ("NEPA"), or to insure compliance with forest plans under the National Forest Management Act ("NFMA"). Nor does record review mean that we abdicate our obligation to

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1. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir.1998) (noting that we review Forest Service actions under the APA and the National Forest Management Act to determine if they were "arbitrary and capricious"); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir.2002) (requiring a "hard look" by agencies at environmental effects of projects); *Idaho Sporting Cong., Inc. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998) (noting that courts should not "second guess[ ] an agency's scientific conclusions" and, for that reason, requiring hard data to discourage second guessing).

scrutinize the agency's underlying data, assumptions, and conclusions. As a reviewing court, we play a critical role in the review process and we have not been shy in letting the U.S. Forest Service know where it has fallen short as a matter of law and process.[2] However, the majority's extension of *Lands Council v. Powell*, 379 F.3d 738 (9th Cir.2004), amended by 395 F.3d 1019, 1024 (9th Cir.2005), represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service. Because the majority has, in effect, displaced "arbitrary and capricious" review for a more demanding standard, I respectfully dissent.

The project under review is designed to address the aftermath of the Lolo National Forest wildfires in Montana in 2000 through selected thinning of smaller timber, salvage of timber, prescribed burning and regeneration of thousands of acres. The administrative record in this case is huge-a 1900+ page Final Environmental Impact Statement (FEIS), 150 detailed maps and 20,000 pages of background information. The majority highlights only parts of this record, criticizes the qualifications of the Forest Service's personnel, and questions various scientific judgments. In faulting the Forest Service's soil quality analysis and concluding that old-

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2. *See e.g. Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 816 (2005) (holding that the Forest Service's timber sale plan was arbitrary and capricious, and violated NEPA, because it was based on a clear misinterpretation of data on market demand for the timber); *Idaho Sporting Cong. v. Thomas*, 137 F.3d at 1154 (holding that a Forest Service plan violated NEPA because it had failed to take a "hard look" at the environmental effects of the proposed timber sale).

growth forest will not be impaired, the majority changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process.

My concern is perhaps best illustrated in the majority's application of *Lands Council* to the soil quality analysis issue. In *Lands Council*, we addressed the Forest Service's analysis of disturbed soil conditions in a watershed restoration project in the Idaho Panhandle National Forest. The Forest Service had taken soil samples from throughout the forest but not in the activity area. *Id.* at 1035. Based on these samples and aerial photographs, it calculated the impact of the watershed restoration project on soil quality in the activity area. *Id.* at 1034.

In *Lands Council*, we rejected the Forest Service's choice of scientific methodology because it did not walk or test soil in the activity area. *Id.* We concluded that the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Id.* at 1035. Given the specific record and circumstances in *Lands Council*, this resolution may have made perfect sense. But in the abstract, without the ability to compare the record in *Lands Council* with the record here, there is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA.

*Appendix A*

Application of *Lands Council* makes even less sense in this specific case. Here, the Forest Service conducted exactly the kind of on-site analyses found lacking in *Lands Council*-soil samples in activity areas. The record lists five activity areas surveyed in soil sample transects and details the walkthrough of a number of activity areas. The majority concedes that these on-site analyses exist but criticizes them for being too few and of poor quality.[3] Resting on this characterization, the majority rejects the Forest Service's soil analysis on the ground that it was " *nearly* identical" to the one we found lacking in *Lands Council.*

*Lands Council* makes compliance with NFMA and NEPA a moving target. If one reads *Lands Council* to require on-site analysis in every case, which I respectfully suggest is an over-reading of the case, the circumstances here comply with that dictate. Yet the majority now says, without support in the record and absent a challenge by Ecology Center at the administrative level, that the on-site analysis was insufficient and that we do not possess enough information to know if the inspectors were qualified. From this judgment, we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality

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3. *See* Op. at 1069 n. 11 (finding the Forest Service's soil transects "did not cover the vast majority of the activity areas; only a few were crossed by coincidence"); *see, e.g., id.* at 1070 ("The record provides little information that enables us to assess the reliability or significance of these reports; . . . we do not know the qualifications of the persons conducting the field review, the methodology utilized. . . ."). To paraphrase an old joke, the majority found the food terrible and the portions small.

of that analysis-even in the absence of contrary scientific evidence in the record. Page after page of the record contains details on field analysis, such as the following representative sample of an evaluation form:

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*Appendix A*

In my view, it is not our role to criticize this evaluation because, for example, the form does not list the evaluator's qualifications. Nor are we in a position to unscramble and pass judgment on the investigator's field notes, as in the following excerpt, which are summarized and integrated into the FEIS:

Had Ecology Center offered a credible scientific critique of this methodology or provided some other basis for us to determine whether the Forest Service's judgment was arbitrary and capricious, we would be in a different position. But just as we are not supposed to substitute our judgment for that of the Forest Service, neither can we rely on-in the absence of evidence-Ecology Center's arguments in its briefs or in its expert declaration filed *after* the administrative review process.

*Lands Council* does not direct us to assess the sufficiency of the Forest Service's on-site soil quality analyses beyond the traditional arbitrary and capricious standard; it only asks us to verify that there is such an on-site sampling. That opinion stated four times that the Forest Service had failed to conduct *any* on-site analysis-it did not say that the Service failed to conduct *enough* of them.[4] The majority now extends the "on-site soil analysis" doctrine, initiated by *Lands Council*, while abandoning its reasoning. Although on-site analysis could plausibly be conducted in such a manner as to be arbitrary and capricious, the majority's justification for finding *this* project to be arbitrary and capricious imports a bright-line rule where individualized analysis is appropriate.

More importantly, in *Lands Council* we did not purport to create a general rule requiring on-site verification for all

4. *See id.* at 1034 ("The Forest Service did not walk, much less test, the land in the activity area."); *id.* at 1035 ("The predictions of the model . . . were not verified with on the ground analysis."); *id.* ("[T]he spreadsheet models, unaccompanied by on-site spot verification . . . , violated NFMA."); *id.* (The "soils analysis was based *entirely* on the model with *no* on-site inspection . . . .") (emphasis added).

scientific hypotheses adopted by the Forest Service regardless of context. We did not even adopt a rule requiring all soil analyses to be verified by on-site sampling. Our decision was specific to the facts of that case. *See Lands Council*, 395 F.3d at 1035 ("*Under the circumstances of this case*, the Forest Service's . . . methodology, to be reliable, required that the hypothesis and prediction of the model be verified with observation.") (emphasis added).

Nevertheless, the majority generalizes the "unverified hypothesis" principle articulated in *Lands Council* beyond the soil analysis context to other scientific findings made by the Forest Service. In so doing, the majority demonstrates the dangers of extending a reference-abstracted from a single, technically detailed, fact-specific decision-to unrelated factual contexts. For example, regarding the old-growth claim, the majority reverses the Forest Service's judgment because "[h]ere, as in *Lands Council*, the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis." Op. at 16039. The Forest Service hypothesis is, however, supported by observational data. There is record evidence, based on direct observation, that treatment produces and preserves habitat for old-growth dependent species.[5]

The majority applies *Lands Council* to prohibit the Forest Service from inferring simply that because treating old-

5. For example, a report by Forest Service scientists utilized historic and stand structure research to plan for treatment that would enhance habitat for plants and species. The scientists found that treated areas have nesting and foraging opportunities for cavity nesting species such as pileated woodpeckers.

growth preserves or creates habitat for dependent species does not mean that such treatment will not harm the species. Op. at 1064 (claiming that the Forest Service just "assumes that a species' viability is maintained so long as the requisite amount of the species habitat is maintained"). In reaching this conclusion, the majority acknowledges and then dismisses without explanation the very record evidence it says the Forest Service failed to provide-here, direct observation of certain species seen foraging in old-growth areas after treatment.[6]

Applying *Lands Council* to the old-growth issue is inappropriate for yet another reason. The panel assumes that Alternative 5, which involves thinning, salvage, and regeneration, disrupts a stable status quo "through an invasive process." Op. at 1064. Yet the status quo is anything but stable. The Forest Service presents uncontested evidence that the failure to treat old-growth areas risks the very harms feared by Ecology Center, even though it has provided no evidence to support such a claim. Op. at 1064 ("Ecology Center does not offer proof that the proposed treatment causes the harms it fears. . . ."). In fact, the record reveals that the

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6. The majority fails to acknowledge that we "have, in appropriate cases, allowed the Forest Service to avoid studying the population trends of [species] by using . . . habitat as a proxy for . . . population trends." *Lands Council*, 395 F.3d at 1036. In *Lands Council*, we rejected a proxy-on-proxy approach for measuring population trends in old-growth forest because the habitat data the Forest Service offered was "fifteen years old, with inaccurate canopy closure estimates, and insufficient data on snags." *Id.* The majority does not identify any such problems in using the proxy-on-proxy approach in this case. *See* Op. at 16040.

failure to treat old-growth areas could result in "considerable loss of old growth trees from bark beetle predation," which will put "at risk. . . specific habitat niches for many wildlife species that are adapted to the more open growth old-forest character." Old-growth areas "are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires." Inaction or delay threatens the species Ecology Center seeks to protect.

No one contests the Forest Service's conclusion that treatment will "provide direct reduction of bark beetle infestation or risk of future infestation." Faced with uncontroverted evidence that inaction may harm old-growth areas, the majority still requires the Forest Service to produce more evidence that treating old-growth will not harm dependent species before it will allow the Service to save old-growth areas from other dangers. Under these circumstances, I cannot agree that the Forest Service's decision to treat old-growth areas was arbitrary and capricious. Indeed, had the Forest Service taken the majority's approach, its decision may well have been arbitrary and capricious for "fail[ing] to consider an important aspect of [the] problem." *See Lands Council*, 395 F.3d at 1026.

Nor do I think it appropriate to analogize the Forest Service process to the separate and wholly inapposite regime of the Food and Drug Administration ("FDA"). The majority writes that "it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial" just as the Forest Service cannot be permitted to "treat more and more old-growth forest without first determining that such

treatment is safe and effective for dependent species." *See* Op. at 1064. Without commenting on the obvious differences between humans and trees (and in fact acknowledging the importance of both to our environment), this analogy underscores the degree to which the majority inserts itself into the internal judgments of the Forest Service. The FDA process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and medical devices. Neither NEPA nor NFMA serve that function in the environmental context. To import the notion of clinical trials from the FDA context to soil sampling in federal forests is a leap too far.

Apparently we no longer simply determine whether the Forest Service's methodology involves a "hard look" through the use of "hard data," but now are called upon to make fine-grained judgments of its worth. In reaching this conclusion, the majority takes aim at two firmly established lines of precedent in administrative law. First, this view is contrary to the basic principle that we reverse agency decisions only if they are arbitrary and capricious. This standard of review does not direct us to literally dig in the dirt (or soil, as it were), get our fingernails dirty and flyspeck the agency's analysis. Yet the majority does exactly that by rejecting the Forest Service's soil analysis field checks and its observations and historical data in treated old-growth forests. The majority's rationale cannot be reconciled with our case law requiring "[d]eference to an agency's technical expertise and experience," particularly "with respect to questions involving engineering and scientific matters." *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir.1989).

*See also Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 871(9th Cir.2004) (reversing a district court decision that certain alternatives violated NEPA because of inadequate deference to the agency's expertise).

Because the majority's analysis cannot be squared with the deferential review required of us, I respectfully dissent.

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

No. 03-35995
D.C. No. CV-03-00018-DWM

ECOLOGY CENTER, INC.,

Plaintiff - Appellant,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; et al.,

Defendants - Appellees,

MINERAL COUNTY; et al.,

Defendant-Intervenors-Appellees.

**JUDGMENT**

Appeal from the United States District Court for the District of Montana (Missoula).

This cause came on the be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

*Appendix A*

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED, REMANDED**.

Filed and entered 12/08/05

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION FILED NOVEMBER 4, 2003

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**MISSOULA DIVISION**

CV 03-18-M-DWM

THE ECOLOGY CENTER, INC.,

Plaintiff,

vs.

DEBORAH L.R. AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; and, UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture.

Defendants.

### I. Introduction

In 2000, approximately 74,000 acres of the Lolo National Forest burned. The United States Forest Service has developed a Lolo Post Burn Project for logging and road construction activities on approximately 4,600 acres. The Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) for the project were released in July,

2002, Plaintiff The Ecology Center opposes this project, which proposes to log 35.2 mmbf, construct 1.7 miles of new road, and reconstruct 287 miles of extant road. The acres at issue include both burned and unburned forest.

This action challenges the defendant's final approval of these timber sales, The Ecology Center maintains that the approval is illegal under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370, the National Forest Management Act (NFMA), 16 U.S.C. § 1600-1614, and the Administrative Procedures Act (APA), 5 U.S.C. § 501-706. These are final agency actions or unreasonable failures to act under the APA. Plaintiff's Complaint includes five claims: first, the Project fails to comply with the Forest Plan and does not insure viability of species in compliance with NFMA; second, the project does not insure that soils will be conserved; third, the FEIS is legally inadequate in violation of NEPA; fourth, the LNF is violating NFMA by implementing an outdated Forest Plan; and fifth, the Forest Service is violating NEPA by failing to produce a supplemental EIS for the LNF Forest Plan, Compl., 24-33.

This Court denied Plaintiff's motion for a preliminary injunction on February 25, 2003. There are now three motions for summary judgment before the Court. There is also a motion by Defendant to strike the Declarations of Jeff Juel and Sara Jane Johnson (dkt # 43) and a motion by Plaintiff to strike portions of the Administrative Record (dkt # 44).

The legal questions facing the Court are whether, under NFMA, the Forest Service is meeting its duty to insure the viability of the black-backed woodpecker (BBW) and other

species, and under NEPA, whether the Forest Service took a hard look at the impacts of this project on these species and old growth forests.

## II. Analysis

### A. Plaintiff's Argument[1]

Plaintiff raises two main arguments against the Lolo Post-Burn Plan in support of its motion for summary judgment[2]: the Lolo NF is not insuring the viability of old growth-dependent species, and the Lolo NF is not insuring soils productivity, both of which are duties imposed by the National Forest Management Act. 16 U.S.C. § 1604(g) (3) (B) & (E).

Plaintiff's old growth argument has two aspects, First, logging in old growth habitat adversely impacts old growth species. Plaintiff decries the Forest Service's apparent focus on the tree component of old growth, rather than on the broader habitat characteristics, including a multi-stored forest. Br., 6. In addition, the Forest Service's own experts have repeatedly pointed out that the LNF is short on snags, which is part of the required habitat of pileated woodpeckers. Br., 10-11. Therefore, the LNF conclusion that logging in these areas will not impact pileated woodpeckers is arbitrary.

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1. Counsel for all parties are advised to read Local Rule 56. No party has fully complied with its requirements.

2. Plaintiff failed to comply with L.R. 56.1(a) and (b), or, in the alternative, (c), and L.R. 10.4(a).

Second, the LNF is not insuring the viability of black-backed woodpeckers (BBWP). The BBWP relies on post-burn habitat. The Lolo NF is lacking in such habitat. Therefore, Plaintiff argues, logging in the very habitat that these birds rely on fails to insure the viability of the species. Br., 16. Plaintiff further argues that the Forest Service's protection of pileated woodpeckers does nothing to protect the BBWP, and therefore the LNF needs to develop a specific conservation plan for the BBWP. Br., 17.

Plaintiff's second major argument is that NFMA imposes a duty on the Forest Service to insure that timber harvest will not irreversibly damage soil conditions, and that the LNF has not met that duty here. Br., 18, Plaintiff criticizes the lack of a LNF specific soil standard in the Forest Plan, and especially, the FEIS plan to collect soils data after project approval. FEIS, 3-126; Br., 19-20. Plaintiff's brief refers to the Declaration of Jeff Juel as an "expert analysis" and an "aid to understanding." Br., 18.

C. Defendants' Argument

Defendants argue that the Lolo Project complies with both NFMA and NEPA, and therefore summary judgment should be granted in their favor,

1. NFMA Claims

Defendants argue that the LNF took a hard look at the impact of this project on the various species at issue, and therefore the project complies with NFMA's species viability requirements. Goshawks, pileated woodpeckers and black-

backed woodpeckers are the Forest Service's species of concern on the Lolo NF. Br., 1. The Forest Service cites extensively from the administrative record to demonstrate how considerations of these species were formulated and supported by analysis. Br., 2-6. Defendants emphasize the acreage amounts of affected territory compared to the amounts of habitat available throughout the forest, In addition, Defendants argue that suitable measures are being taken or are planned, such as monitoring and treatment options, that sufficiently limit the impact of the project on these species. This determination, Defendants argue, is due considerable deference.

Defendants' second argument addresses the issue of old growth and snag protection. Defendants argue that the Post Burn Project will enhance old growth on the Forest, a contention that Plaintiff hotly disputes.[3] Br., 6. The administrative record contains information demonstrating, Defendants argue, the usefulness and success of similar old growth enhancement projects. Br., 7; AR 48: AA-1-AA-17; AR 38-375. In addition, the snag standards are being met, Br., 12.

Defendants address the argument about NFMA's soil requirements by reference to their preliminary injunction brief. Br., 13.

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3. Perhaps too hotly. At Page 8, Defendants point out that Plaintiff deleted language from the Hillis article to exclude what might be the most pertinent phrase, changing "Stand structure is now predominately single-storied and likely resembles historic conditions, which represents a change from the multi-storied pre-treatments stand." By deleting the bolded language, Plaintiff's counsel significantly changes the implication of the sentence and undermines the credibility of the Plaintiff's case.

*Appendix B*

Defendants next address Plaintiff's fourth and fifth claims, both of which assert that the LNF's continuing management of the forest without an amended forest plan or without supplementing the Plan's EIS is a violation of the law. Br., 13. Defendants argue that revision or amendment is discretionary. Br., 14; 16 U.S.C. § 1604(a); 36 C.F.R. § 219.10(f)&(g). Therefore, Defendants argue, this Court does not have jurisdiction under NFMA to hear Plaintiff's allegation of failure to amend, since there is no final agency action giving rise to an APA claim, Defendants also argue that, as a matter of recent law, the Forest Service is not in violation of NFMA because its plan has expired. Br., 14, FN17; Pub. L. No. 108-7, § 320, 117 Stat. 11 (Feb. 20, 2003).[4]

2. NEPA claims

Defendants argue that the LNF took the requisite "hard look" at the impacts of the Lolo Post Burn Project. Br., 16. The FEIS analysis supports the LNF's need for fuel reduction, not to reduce the risk of future fires occurring, but rather, to

4. Section 320 reads, "Prior to October 1, 2003, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f) (5)(A)of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604 (f) (5) (A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 et seq,) or any other law *Provided*, That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis."

reduce the duration and intensity of those future fires. Br., 17.

The LNF also took a hard look at insect predation issues, Defendants argue. Br., 17-18; FEIS 1: 8, 2: 73, 3:142-43, 152-55; 4-96-98.

D. Intervenor's Argument

Intervenors' arguments are similar to the Defendants'. Intervenors argue that there is sufficient evidence in the record to conclude that the Forest Service considered the impacts of this project on the pileated and black-backed woodpeckers and on the goshawk. Br., 5-7. Further, Intervenors disagree with Plaintiff's characterization of the sensitive or old growth-dependant nature of these three species. Br., 7.

Intervenors point out that the management objectives of NFMA require a multiple use approach to forest management; the Forest Service is not in violation of NFMA if it chooses an alternative that is not the absolute best for species viability, *Seattle Audubon Society v. Mosley*, 80 F.3d 1401 (9th Cir. 1996); Br., 7

Next, Intervenors attempt to distinguish *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002), and *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002), upon which Plaintiff relies heavily, from this case. Br., 8-9.

Intervenors then address Plaintiff's soils claims. Intervenors argue that the Lolo Project was designed to minimize the impacts of the project on soils. Br., 9-11; 1 AR A-3: FEIS 3-25; 15 AR M-79. Further, the Forest Service has acknowledged that salvage sales may have a negative impact on soils; NEPA does not require more than a consideration of impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); Br., 12.

Finally, Intervenors argue that even if this Court determines that the Lolo Post Burn Project is in violation of the law, the Court should not automatically impose an injunction but should instead entertain briefing on the equities of such an injunction. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995) ; Br , 13-15. Intervenors detail the harms to the community and the potential environmental harms that could result from enjoining these sales.

E. Analysis

Pursuant to Rule 56(c), Fed.R.Civ.P, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The moving party must establish that no genuine issue of material fact exists. A material fact is one which is relevant to an element of a claim or defense, and its materiality is determined by the substantive law governing the claim or

defense. *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987), Once a moving party meets its burden that no genuine issues of material fact exist, the burden shifts to the party opposing summary judgment to show specific material facts which remain at issue, *Kaiser Cement Corp. v. Fischback & Moore*, 793 F.2d 1100, 1103-1104 (9th Cir. 1986).

When reviewing agency action, this Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted.) "When evaluating a motion for summary judgment, the court views the record evidence through the prism of the evidentiary standard of proof that would pertain at a trial on the merits." *Eli Lilly & Co. v. Barr Laboratories*, Inc., 222 F.3d 973, 980 (Fed. Cir., 2000.) Judicial review of agency decisions under the Administrative Procedure Act allows the Court to overrule agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court must defer to the Forest Service if its decision is "fully informed and well-considered." *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quotations and citation omitted).

Plaintiff has questioned the adequacy of the Forest Service's conclusions on scientific issues but has not carried the burden of demonstrating that the Forest Service's conclusions were contrary to law. NEPA requires the Forest Service to take a hard look at the impacts of its project.

*Appendix B*

*Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998). The record demonstrates that the Lolo National took the requisite hard look at the impacts of this project on both the animal species at issue, and on old growth and soil conditions

The Post Burn Project evaluates current and historical soil conditions on the Lolo National Forest and identifies the predicted impacts of the Project on those conditions. FEIS 3-31-32; 3-35-48. Further, the Forest Service proposed mitigation and monitoring plans to follow up on the results of the project. FEIS: 2-36; 2:41-42; 2:61-62.

The Forest Service considered the impacts of this project on the goshawk, pileated woodpecker, and black-backed woodpecker. The Forest Service concluded that the proposed activities would have no cumulative negative impacts, based on the evidence in the record before the agency. FEIS 4-117; 4-119; 4-123; 4-125.

Plaintiff criticizes the Forest Service's analysis of the goshawk, but the Forest Service has surveyed for the birds. FEIS:3-186-87. They are not known to live in the project area. In addition, the fires themselves would have done damage to goshawk habitat. FEIS: 3-187. The Post Burn Project activities will not impact goshawks, were they extant, any more than the fires already have. FEIS: 2-78; Map 3.18.12.

Likewise, the Lolo Post Burn FEIS sufficiently considers the impact of the project on both the black-backed woodpecker (FEIS: 2-78; 3-187-89; Maps 3.18.13a & b,

4.13.16a & b, and 4.13.17a & b) and the pileated woodpecker. (FEIS: 2-79; 3-192; Maps 3.18.15a & b, 4.13.20a & b, 4.13.21a & b.)

Plaintiff repeatedly disputes management decisions of the Forest Service, including what Plaintiff sees as the Forest Service's misguided fire policy, the Forest Service's approach to old growth habitat management (Br., 8-9), and the LNF's choice of scale for its consideration of soils impacts (Br., 20), among other things. This Court is not in a position to settle scientific disputes. Plaintiff's own argument in support of its view is not always unequivocal. For example, Plaintiff quotes a 2000 guidance paper on biodiversity (Pfister et al.) that states, in part, "opinions of well-qualified experts vary in this regard." Br., 9, Further, on the soils issue, there is no apparent reason why a soils assessment, based on geological conditions that are more or less unchanging on a landscape scale, should be conducted in the same manner or on the same scale as a wildlife evaluation. Soils do not require habitat. See Pl.'s Br., 20 (comparing Management Indicator Species monitoring with soil monitoring.) If opinions of experts conflict, as the record before the Court suggests, the Court defers to the expertise of the agency. While the Court need not forgive "a clear error of judgment," neither may the Court substitute its own judgment for that of the Forest Service. *Citizens to Improve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). Plaintiff's motion for summary judgment is denied.

*Appendix B*

III. Motion to Strike Declarations

Defendants moved to strike the two declarations attached to Plaintiff's summary judgment brief and the portions of Plaintiff's argument that rely on them. Defendants argue that this Court's scope of review for agency action allows only consideration of the record before the decision-maker. Whether the agency's decision was legal must be determined by review of the agency's record. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); Def.'s Br., 2. Under limited exceptions, the Court may consider documents outside of the administrative record. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). Such extra-record evidence is permissible in four circumstances: 1.) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, 2.) when the agency has relied on documents not in the record, 3.) when supplementing the record is necessary to explain technical or complex matters, and 4.) when Plaintiffs make a showing of agency bad faith. *Northcoast Environmental Center et al. v. Glickman*, 136 F.3d 660, 665 (9th Cir, 1998) (citing *Southwest Center*, 100 F.3d at 1450).

Defendants claim that Plaintiff's declarations do not fall within any of these exceptions (Br., 4) and that Plaintiff is trying to turn an administrative review case into a battle of the experts. Br., 5.

The agency is entitled to deference to its decisions based on its expertise. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1988); Br., 6. Because Plaintiff's

declarations do not fall within any exemption, the motion is granted and the declarations shall be stricken.

## IV. Motion to Strike Portions of the Administrative Record

Plaintiff moved to strike the portions of the administrative record submitted by the Forest Service that were not before the agency at the time the disputed decisions were made. In particular, Plaintiff objects to the "Forest Inventory and Analysis" in Volume 48,

The Government responds that Plaintiff failed to comply with Local Rule 7.1(c), which requires a brief to be submitted with a motion. In addition, Defendants respond that Plaintiff only identified one document, which is a synopsis of forest survey information from 1995 and 1996; this information would have been available to the decision-maker at the time of decision.

Plaintiff's motion is inadequate and therefore is DENIED, The sole document specifically mentioned does appear to have been available, in some form, to the decision-maker. In addition, Plaintiff's motion fails to comply with L.R. 7.1(c). Under L.R. 7.1(i), such motions may be subject to summary ruling.

Therefore, for the foregoing reasons, it is HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (dkt #32) is DENIED;

2. Defendants' motion for summary judgment (dkt #34) is GRANTED;

3. Intervenors' motion for summary judgment (dkt #40) is GRANTED;

4. Defendants' motion to strike (dkt #43) is DENIED;

5. Plaintiff's motion to strike (dkt #44) is DENIED.

Dated this 4th day of November, 2003.

s/ Donald W. Molloy
DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 8, 2006**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 03-35995

D.C. No. CV-03-00018-DWM
District of Montana,
Missoula

ECOLOGY CENTER, INC.,

Plaintiff - Appellant,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Defendants - Appellees,

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT NO. 6; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER,

Defendant-Intervenors - Appellees.

*Appendix C*

**ORDER**

Before: B. FLETCHER, McKEOWN, and GOULD, Circuit Judges.

The panel has voted to deny the petitions for panel rehearing submitted by defendant-appellees Deborah Austin and the United States Forest Service and defendant-intervenor-appellees Mineral County, Town of Superior, et al. Judges McKeown and Gould have voted to deny these parties' petitions for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the petitions for rehearing en bane and no gidge has requested a vote on whether to rehear the matter en Banc. Fed. R. App. P. 35.

The defendant-appellees' and the defendant-intervenor-appellees' petitions for panel rehearing and petitions for rehearing en bane are **DENIED.**

Supreme Court, U.S.
FILED
NOV 1 / 2006
OFFICE OF THE CLERK

No. 06-344

IN THE
# Supreme Court of the United States

MINERAL COUNTY, et al.,

*Petitioners,*

v.

ECOLOGY CENTER, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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November 2006

## QUESTIONS PRESENTED

1. Should this Court further review the Ninth Circuit's holding that, on the particular facts of this case, the U.S. Forest Service was required under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), to verify its hypothesis that commercial thinning and prescribed burning of old-growth stands would not be harmful before implementing those practices?

2. Should this Court further review the Ninth Circuit's holding that, in this case, the U.S. Forest Service was required to collect on-site soil data for affected timber harvest units?

3. Should this Court further review the Ninth Circuit's holding that a now-repealed regulation promulgated under the National Forest Management Act and the applicable Forest Plan require the U.S. Forest Service to maintain wildlife viability?

## CORPORATE DISCLOSURE

Since the decision of the court of appeals, but prior to the filing of this opposition, Respondent Ecology Center, Inc., has become WildWest Institute, Inc. Respondent is a non-profit, non-stock corporation. Respondent has no parent, subsidiaries, or affiliates, and no other entity owns any interest in it. For convenience, this opposition refers to Respondent as Ecology Center, Inc.

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## STATEMENT OF THE CASE

*Factual Background*

The Lolo National Forest Plan (LNFP) was adopted in 1988. In 2000, following a series of wildfires that burned approximately 74,000 acres of the Lolo National Forest (LNF), the Forest Service began developing the Lolo National Forest Post Burn Project (the Project), which provided for logging and road construction activities across approximately 4,600 acres. Pet. App. 40a. In accordance with the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Forest Service prepared an Environmental Impact Statement (EIS). The Service considered several alternatives for the Project and eventually selected alternative number five, which involved the commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber.[1] Pet. App. 3a.

The EIS had three distinct characteristics relevant to the issues now before this Court. First, the EIS provided no evidence that the logging and burning of old-growth stands would benefit, or at least not harm, species that live in those stands, such as the pileated woodpecker. *Id.* 7a. Second, despite the LNFP's requirement that the Forest Service take steps to maintain population viability for at-risk species, and the fact that the Forest Service has designated the black-backed woodpecker as a "sensitive species," the Service did not explain the basis for its conclusion that the removal of post-burn habitats would not adversely affect the black-backed woodpecker, which depends on a post-burn habitat. *Id.* 12a-

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[1]Salvage logging is the logging of dead, burned, or diseased trees.

13a.[2] Finally, although the Regional Soil Quality Standard prohibited the Forest Service from taking any action that would create detrimental soil conditions in fifteen percent of the area to be salvage harvested, *see* Forest Service Manual ("FSM") R1 Supplement 2500-99-1, the Forest Service declined to confirm the accuracy of its estimated soil conditions by direct on-site observation of the activity areas. Pet. App. 19a.

*Procedural Background*

Respondent Ecology Center, Inc., filed its complaint in the United States District Court for the District of Montana, challenging the Forest Service's decision to permit commercial logging in old-growth stands, the adequacy of the Forest Service's analysis of the impact of salvage logging in post-fire habitat, and the adequacy of the Forest Service's analysis of soil quality. The district court denied Ecology Center's motions for a temporary restraining order and a preliminary injunction, Pet. App. 41a, and later granted summary judgment in favor of the Forest Service.

The Ninth Circuit reversed, with one judge dissenting. The majority held that the Forest Service's decision to permit logging in old-growth stands and post-fire habitats was arbitrary and capricious because, among other things, the Forest Service took no steps to verify its hypothesis that logging in old-growth

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[2]The Forest Service Manual defines sensitive species as "[t]hose plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by: (a) [s]ignificant current or predicted downward trends in population numbers or density[, or] (b) [s]ignificant current or predicted downward trends in habitat capability that would reduce a species' existing distribution." FSM 2670.5.

stands was beneficial to dependent species, did not consider the effect of salvaging on the black-backed woodpecker's viability, and did not directly observe the soil conditions in the affected area. Petitioners' request for panel rehearing and rehearing *en banc* were denied, with all three panel judges voting to deny both requests and no other judge requesting rehearing *en banc*. *Id.* 55a.

Petitioners have now sought review in this Court. The Forest Service—the defendant below and the agency charged with implementing the two federal environmental laws at issue in this case—has not sought review.

## REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, the court of appeals imposed no procedural or substantive requirements on the Forest Service other than those found in NEPA and the National Forest Management Act (NFMA). Furthermore, the court of appeals' holding that the Forest Service's decision was arbitrary and capricious is entirely fact-based; the court correctly identified the applicable law, and applied it to the facts before it. Because the petition presents no legal issue that has divided the lower courts, and because further review by this Court would not provide meaningful guidance for future litigation, the Court should deny the petition.

### A. THE NINTH CIRCUIT CORRECTLY IDENTIFIED THE APPLICABLE RULES OF LAW.

In reviewing the Forest Service's decision to treat old-growth stands through prescribed burning and commercial logging, the court of appeals correctly identified and applied the

proper standard of review in determining whether the Service complied with NFMA and NEPA. First, the court recognized that its review of the Forest Service's decision under both NFMA and NEPA is controlled by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and, therefore, the court reviewed the Forest Service's actions only to determine if they were "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Pet. App. 5a (citing *Lands Council v. Powell*, 379 F.3d 738, 743 (9th Cir. 2004) (citing 5 U.S.C. § 706(2))).

Similarly, the court of appeals correctly stated the law under NEPA. It acknowledged that NEPA does not impose substantive requirements, but rather is designed to "force agencies to publicly consider the environmental impacts of their actions before going forward." Pet. App. 6a (quotation omitted). The court correctly noted that NEPA requires the Forest Service to prepare a detailed EIS, which "provide[s] a full and fair discussion of significant environmental impacts and . . . inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Id.* (citing 40 C.F.R. § 1502.1).

Finally, the court correctly identified the reach of NFMA's procedural and substantive requirements. The court correctly held that NFMA requires the Forest Service to develop a land and resource management plan and that subsequent agency action must comply with both that plan and NFMA. *Id.* 5a. The court correctly identified NFMA's mandate to preserve diverse wildlife and to maintain soil productivity. *Id.* 6a (citing 16 U.S.C. § 1604(g)). Further, the court correctly held that, under NFMA, the agency's choice of methodology is entitled to deference. *Id.* 8a.

Petitioners' request for further review is based entirely on arguments that the court of appeals incorrectly applied the APA's standard of review to the facts before it. Pet. 6. Although the court of appeals properly applied the APA's deferential standard, even if it had not, Petitioners' disagreement with the lower court's application of properly stated rules of federal law does not provide grounds for review by this Court. *See* S. Ct. R. 10.

### B. THE CIRCUIT COURTS AGREE THAT NFMA AND NEPA MAY REQUIRE THE AGENCY TO BRING FORTH SOME EVIDENCE TO SUPPORT ITS HYPOTHESIS.

In requiring that the Forest Service conduct some research to verify that treating old-growth stands will not harm dependent species, the court of appeals' decision is entirely consistent with NEPA and NFMA, as well as this Court's opinions construing those Acts. As such, it does not impose any new substantive or procedural requirements on the Forest Service. Notably, Petitioners do not (and cannot) argue that the decision below is in tension with any other circuit court decision because no split exits over whether, in some instances, the Forest Service must conduct some research to verify a hypothesis about the effect of a federal action on the environment.

#### 1. The Court of Appeals' Opinion Is Consistent with NEPA and NFMA.

The court of appeals held that, by failing to take any steps to verify its hypothesis that treatment of old-growth stands would not harm dependent species, the Forest Service's

decision was arbitrary and capricious. Specifically, the court held that the Forest Service acted arbitrarily and capriciously because it did not test its hypothesis that thinning old-growth stands by commercial logging and prescribed burning will not harm species that depend on those stands to provide a habitat. That decision is entirely consistent with NEPA and NFMA.

NEPA requires that an agency prepare an EIS before undertaking a project that will significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). The EIS must "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. As many courts have recognized, and as the implementing regulation indicates, one of the purposes of an EIS is to inform the public of the reason for an agency's action. *See Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) ("The 'informational role' of an EIS is to 'give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process . . . .'") (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)). NEPA's requirement that an agency prepare an EIS is not satisfied simply by the preparation of a document based on an unverified, unresearched hypothesis, in large part because such a bald conclusion, without more, does not demonstrate that the agency has properly considered the relevant environmental concerns. In addition, without explaining why the agency believes a proposed action will (or will not) have a specific effect, an EIS cannot provide a "full and fair discussion of significant environmental impacts" that may result from agency action. 40 C.F.R. § 1502.1. Put otherwise, without such an explanation, the public will have no basis for evaluating the proposed action.

Contrary to Petitioners' argument, an agency's use of a new scientific theory to evaluate proposed action does not relieve the agency of verifying the accuracy of that theory. NEPA's implementing regulations establish that unless the cost of obtaining information necessary to make a reasoned choice among alternatives is exorbitant, tl ; agency must include that information in the EIS. *See* 40 C.F. R. § 1502.22(a) ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement."). In this case, the Forest Service declined to include any information verifying its theory that burning and commercially logging old-growth stands would benefit, or at least not harm, the species that depend on those stands, nor did it indicate that the cost of providing such information would be exorbitant.[3] Pet. App. 12a. To the contrary, the Forest Service had subjected old-growth stands to commercial logging and prescribed burning in the past, and thus had an opportunity to directly observe the effects of those practices on dependent species, *id.* 9a, as well as an affirmative obligation to do so under the terms of the LNFP. As such, the decision that the Forest Service acted arbitrarily and

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[3]Any argument that data on the effect of the proposed treatment on dependent species were not essential must fail. The LNFP explicitly requires that the Forest Service maintain 80% of those species dependent upon the snags (dead trees) that are normally found in an unmanaged forest. Lolo National Forest Plan II-14. Because NFMA requires that projects comply with the mandates set forth in the relevant forest plan, 16 U.S.C. § 1604(i), the Service is required under NFMA to insure that the old-growth treatment would not harm dependent species.

capriciously by failing to take any steps to verify its hypothesis is consistent with the mandates of NEPA.

A close reading of the court of appeals' decision underscores the narrowness of that court's review of the Forest Service's action. The court's decision does not require that the Service reach a particular result, but rather that it follow NEPA's procedures. *Id.* ("While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any 'on the ground analysis,' despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so." (citation omitted)). In challenging the Forest Service's unverified hypothesis that salvage logging will not destroy the black-backed woodpecker's habitat, the court went out of its way to make assumptions favorable to the Forest Service's actions, including the assumption that the 2000 fires created post-fire habitat for dependent species, thus reducing the impact of salvage logging. Even assuming all conditions favorable to the Forest Service, however, the Service failed to comply with NEPA's procedural requirements. For example, even if the 2000 fires created post-burn habitat, the EIS does not indicate how much post-burn habitat dependent species require, making meaningful review of the Service's decision to destroy some of that habitat impossible. *Id.* 16a.

Like NEPA, NFMA is not satisfied by hollow allegations that an action will not be harmful to the environment. NFMA requires not only that the Forest Service comply with certain procedural requirements, like those set forth in NEPA, but that the agency take actions to advance certain congressionally identified substantive objectives. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). The Forest Service must protect forest resources to

provide for wildlife, 16 U.S.C. § 1604(g)(3)(A), and must provide for diversity of plant and animal communities. *Id.* § 1604(g)(3)(B). Under NFMA, the Forest Service is required to develop and implement a land and resource management plan that complies with NFMA's substantive requirements, including the protection of wildlife. *Id.* § 1604(a). Subsequent actions, such as the Project at issue here, must comply with both the relevant forest plan and the substantive mandates of NFMA. *Id.* § 1604(i).

By failing to verify its hypothesis that thinning old-growth stands through burning and commercial logging will not harm dependent species, the Forest Service could not comply with NFMA's substantive mandates. For instance, the LNFP explicitly requires that "sufficient snags and dead material will be provided to maintain 80 percent of the population of snag-using species normally found in an unmanaged Forest." LNFP II-14. There is no dispute that the Forest Service failed to verify its hypothesis that the treatment proposed would benefit, or at least not harm, snag-dependant species such as the black-backed woodpecker. Under NFMA, the Forest Service was required to comply with the LNFP, 16 U.S.C. § 1604(i), and the Service's failure to do so here provides an additional basis for the court's holding that the Service violated that Act. Further, the Forest Service's failure to verify its hypothesis is an especially egregious violation of NFMA because the Service had similarly treated old-growth stands elsewhere and thus had an opportunity to test its effects on dependent species. Pet. App. 9a. Thus, the court's holding that the Forest Service failed to fulfill is responsibilities under the NFMA is entirely consistent with the substantive requirements of that Act.

2. The Court of Appeals' Decision Is Consistent with the Holdings of this Court and of the Other Courts of Appeals.

Petitioners argue that the holding below conflicts with this Court's precedent, insofar as it concluded that the Forest Service violated NEPA and NFMA by failing to provide any evidence to support its unverified hypothesis. This Court has repeatedly held that NEPA requires agencies to take a "hard look" at the environmental consequences of agency action. *See Baltimore Gas*, 462 U.S. at 97; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The court's holding, that the Forest Service violated NEPA by failing to assess whether old-growth treatment would harm dependent species, follows this Court's repeated holdings that the Act requires the Service to examine environmental consequences before taking federal action.

Petitioners' argument that the court of appeals should have been especially deferential because the Forest Service was making a prediction within its area expertise at the "frontiers of science," *Baltimore Gas*, 462 U.S. at 103, is misplaced. First, the court did not evaluate the content of the Forest Service's prediction, but considered only whether the EIS contained enough information to support its conclusion. Second, unlike the agency's prediction in *Baltimore Gas*, the Forest Service's hypothesis as to the effect of the removal of old growth on dependent species was neither on the frontiers of science nor difficult to verify. In *Baltimore Gas*, the Court reviewed the amount of evidence necessary to support the Nuclear Regulatory Commission's adoption of a table measuring the resources used and effluents released by a light-water reactor's

fuel cycle activities over the course of a year's operation. *Id.* at 91. The core of the controversy was the Commission's decision to affix a zero value to the environmental impact of long-term storage of transuranic and high-level waste, because the Commission staff believed that the technology could be developed to isolate that waste from the environment. *Id.* at 91-92. Here, by contrast, the court reviewed only whether commercial logging and prescribed burning of old-growth stands would harm dependent species. As noted earlier, and unlike in *Baltimore Gas*, the Forest Service was able to assess the effect the treatments might have had because the Forest Service had treated similar old-growth stands in the past. Pet. App. 9a. The validity of the Forest Services's assumption does not depend on future technological developments, nor is it undiscoverable.

Other circuits that have considered whether agencies may act under NEPA without providing evidence supporting their conclusions regarding the environmental consequences of federal action have taken the same approach as the court below. *See Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996) (holding that NEPA requires agencies to provide more than mere assertions, but must indicate their basis for them); *Chelsea Neighborhood Ass'n v. U.S. Postal Service*, 516 F.2d 378, 389 (2d Cir. 1975) (holding that without detailed analysis, an agency's conclusions do not satisfy NEPA); *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973) (holding that NEPA requires that "the agency . . . go beyond mere assertions and indicate their basis for them"); *cf. Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1301-02 (8th Cir. 1976) (holding that Forest Service's actions were not arbitrary and capricious because the EIS contained conclusions supported by intensive research, including thousands of pieces

of information). Because no split among the circuits exists, further review is unnecessary.

Furthermore, the court's holding that the Forest Service violated NFMA by failing to verify that its proposed treatment would not harm dependent species is consistent with other courts' reading of that Act. Although this Court has not yet had the opportunity to interpret NFMA, it has recognized that the Act requires the Forest Service to create plans that provide for coordinated use of forests. *Ohio Forestry Ass'n*, 523 U.S. at 737 (citing 16 U.S.C. § 1604(e), which requires forest plans to "include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness"). The lower court's decision that the Forest Service failed to comply with NFMA by assuming that old-growth treatment would benefit dependent species is consistent with this Court's understanding of that Act.

Similarly, the holding below is consistent with the decision of the only other circuit court to have considered whether NFMA requires the Service to put forth at least some evidence of its hypotheses. In that case, the Eleventh Circuit found that by making assertions in the absence of evidence, the Forest Service violated NFMA. *See Sierra Club v. Martin*, 168 F.3d 1, 5 (11th Cir. 1999) (concluding that deference should not be accorded to Forest Service when it fails to present evidence to support its assertions). No court has held that the Forest Service meets its burden under NFMA in the absence of evidence that its proposed action complies with the congressional mandates set forth in the Act. Thus, review should be denied on the NFMA issue as well.

### C. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING THE APPLICATION OF NFMA OR NEPA TO ON-SITE VERIFICATION.

Contrary to Petitioners' argument, the court of appeals did not impose procedural or substantive requirements not found in NEPA. Rather, the court held only that the Forest Service acted arbitrarily when it found, in the absence of any concrete evidence, that the proposed project would not violate the Regional Soil Quality Standard. The court determined that the Service's review of the effects of the proposed plan was insufficient because the Service declined to directly observe the soil in the affected areas, Pet. App. 19a, and did not conduct any other on-site verification of soil conditions. Rather, the Forest Service merely estimated soil conditions on the basis of maps, samples, aerial reconnaissance, and computer modeling. The court's conclusion is consistent with the Service's own expert, who argued that the Service's conclusions about the activity areas were not reliable because the Service failed to test the activity areas themselves, as required by the standard. *Id.* 23a.

Other courts of appeals to have considered challenges to agency action under NEPA—the Fourth and D.C. Circuits—have reached consistent conclusions: Data gathered on-site satisfies NEPA's procedural requirement and may be necessary to a full and fair discussion of the environmental impacts of a proposed course of action. *See Nat'l Audubon Soc'y v. Dept. of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (noting that the Forest Service was required to gather on-site data to determine where waterfowl loafed and foraged); *cf. Sierra Club v. Dept. of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) (rejecting plaintiff's challenge to FAA's actions because the agency gathered on-site noise measurements, thereby satisfying

NEPA's procedural requirements). Like the decision below, these cases acknowledge that, in some instances, the Forest Service will be required to conduct some on-site data collection to comply with the procedural requirements of NEPA and to ensure that proposed federal action does not violate NFMA's substantive mandates.

Notably, Petitioners do not—and cannot—argue that there is a split among the circuits on this question. And, indeed, no court has held that NEPA never requires an EIS to contain site-specific analysis. Such a per se rule would overlook a fundamental NEPA precept: that the depth of analysis needed for a proper EIS depends on the nature of the proposed project. *See Dubois*, 102 F.3d at 1287 ("What level of detail is sufficient depends on the nature and scope of the proposed action.").

Curiously, the Forest Service acknowledged that on-site verification would be necessary before going forward with the Project. Pet. App. 24a. As the court of appeals observed, "[t]he fact that the Service plans to conduct on-site verification prior to any harvesting implies that even the Service recognizes that its soil-quality estimates need to be verified." *Id.* Thus, the holding that NEPA and NFMA require the Forest Service to conduct on-site verification of its soil-quality estimates is not only consistent with those Acts, this Court's jurisprudence, and the holdings of its sister courts, but is consistent with the Forest Service's own statements that further study of the soil effects is necessary before implementing agency action.

## D. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING WHETHER NFMA AND ITS IMPLEMENTING REGULATIONS HAVE A VIABILITY MANDATE.

The court of appeals held that the Forest Service's decision violated NFMA because the Forest Service failed to analyze and explain the effect salvage logging would have on the black-backed woodpecker. Petitioners argue that the court read a new substantive requirement into NFMA, and that therefore, the court's decision conflicts with those of other circuits. Petitioners are incorrect.

### 1. The Court of Appeals Did Not Read New Substantive Requirements into NFMA.

In requiring that the Forest Service take steps to maintain wildlife viability, the Ninth Circuit did not read a new substantive requirement into NFMA or its implementing regulations. NFMA's 1982 regulation, 36 C.F.R. § 219.19, required the Forest Service to "maintain viable populations of species across the forest." Although that regulation was repealed in 2000, Petitioners cannot and do not dispute that it applies to the LNFP here, which was adopted in April 1986 pursuant to NFMA's 1982 regulations.[4]

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[4]Petitioners' argument that neither NFMA nor its implementing regulations contain a viability mandate assumes that the Project is governed by the current regulations, which were not finalized until 2005. After the 2000 repeal of the 1982 regulation, the Forest Service was still obligated to maintain wildlife viability from November 9, 2000, until January 2005, under transitional rules,

(continued...)

Additionally, LNFP explicitly adopts the mandate to maintain wildlife viability, especially for species for which survival is a concern, such as sensitive species. *See* LNFP II-1. Specifically, the LNFP requires that, for plants and animals for which viability is a concern, the Forest Service must "manage to maintain population viability." LNFP II-14. Once a Forest Plan is adopted, NFMA prohibits any site-specific activities inconsistent with that plan. 16 U.S.C. § 1604(i); *Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F.3d 754, 757 (9th Cir. 1996). Accordingly, the court of appeals correctly held that NFMA requires that the Project contain measures to maintain wildlife viability.

Moreover, even if the Forest Service had not been bound by the LNFP's mandate to maintain viability, the Project itself incorporates the 1982 regulations. *See* Record of Decision, ch. 9 pg. 36 (citing 36 C.F.R. § 219.27). The Service expressly incorporated the 1982 rules into its final decision and was thus bound by 36 C.F.R. § 219.19's viability mandate. *See Envtl. Protection Info. Center v. U.S. Forest Service*, 451 F.3d 1005, 1017 n.8 (9th Cir. 2006) (noting that the Forest Service

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[4](...continued)
which governed until the new regulations were implemented. Like the 1982 rules, the transitional rules required the Forest Service to maintain wildlife viability. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67514-01, 67518 (Nov. 9, 2000); *see Utah Envtl. Congress v. Dale Bosworth*, 443 F.3d 732, 737 (10th Cir. 2006). Petitioners did not argue below that the Forest Plan, and thus the Project, are governed by the new regulations. Thus, any argument that the Plan is not governed by the now-repealed regulation is waived and should not be considered by this Court.

is required to comply with regulations and forest plan in place at the time of its decision).

Finally, the Project is unique insofar as it is governed by regulations that have since been repealed. Because the court of appeals' decision construes regulations that apply to a small set of the Service's actions, the practical application of a decision in this case is necessarily limited to plans and projects governed by the now-repealed regulations. The Lolo National Forest is now in the process of revising its Forest Plan under the new rules. *See* http://www.fs.fed.us/r1/wmpz/ (Lolo Revised Plan proposed on May 16, 2006). For this reason as well, this Court's review is unwarranted.

2. There Is No Circuit Split as to the Role of Viability in Plans and Projects Governed by the 1982 Regulations.

In recognizing that NFMA requires the Forest Service to insure that its decisions will not undermine wildlife viability, the court of appeal's decision is consistent with the holding of every other circuit to construe NFMA, the 1982 implementing regulations, and the 2000 transitional rules. *See Dale Bosworth*, 443 F.3d at 744 (rejecting plaintiff's challenge to a project because it was "not likely to result in a trend towards federal listing or loss of viability"); *Indiana Forest Alliance, Inc. v. U.S. Forest Service*, 325 F.3d 851, 861-62 (7th Cir. 2003) ("The NFMA further requires that each plan set forth objectives to, among other things, ensure a diversity of plant and animal species and maintain the viability of desired species.") (citing 16 U.S.C. § 1604(e)); *Martin*, 168 F.3d at 3 n.2 (noting that forest management plans must "maintain the viability of native and desired non-native vertebrate species"); *Sierra Club v. Espy*, 38 F.3d 792, 800-01 (5th Cir. 1994) ("The regulations

implementing NFMA provide a minimum level of protection by mandating that the Forest Service manage fish and wildlife habitats to insure viable populations of species in planning areas.").

Petitioners misread *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). There, the plaintiff argued that NFMA required the Forest Service to maintain plant and animal diversity as distinct from tree diversity and apply an ecological approach to forest management. *Id.* at 619. Although the court rejected the argument that the Forest Service is obligated to incorporate conservation biology into its diversity analysis, the Seventh Circuit approved of the Forest Service's population viability analysis and emphasized the importance of analyzing the viability of species that are endangered. *Id.* at 620. Rather than rejecting a reading of NFMA's diversity provision that requires the Forest Service to maintain wildlife viability, the Seventh Circuit embraced that construction. *See Indiana Forest Alliance*, 325 F.3d at 861-82. Thus, the Seventh Circuit's ruling underscores the circuits' uniform approach to NFMA's viability mandate.

### E. A SETTLEMENT OF RELATED LITIGATION FURTHER UNDERMINES THE CLAIM FOR REVIEW.

In contemporaneous litigation, the Sierra Club sued the Forest Service based on similar objections to the Project. Pet. App. 4a; *see Sierra Club v. Austin*, No. CV-03-22-M-DWM (D. Mont.). Sierra Club and the Forest Service entered into a settlement, which reduced environmental impacts that would have been caused by the Plan. For example, after the settlement, the number of acres of potential black-backed

woodpecker habitat subject to salvage logging was reduced from 815 to 155. Pet. App. 15a n.5.

As the Sierra Club settlement indicates, the parties here are fully capable of sorting through the remaining issues through negotiation. The successful negotiations between the Sierra Club and the Forest Service, and the potential for similar negotiations between the parties here, provides yet another reason for this Court to deny review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-344

# In the Supreme Court of the United States

MINERAL COUNTY, MONTANA, ET AL., PETITIONERS

*v.*

ECOLOGY CENTER, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR FEDERAL RESPONDENTS

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## QUESTION PRESENTED

Whether the court of appeals failed to apply the proper standard of review under the Administrative Procedure Act in evaluating whether the Forest Service had complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*

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# In the Supreme Court of the United States

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## BRIEF FOR FEDERAL RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 430 F.3d 1057. The opinion of the district court (Pet. App. 40a-53a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005 (Pet. App. 38a-39a). A petition for rehearing was denied on May 8, 2006 (Pet. App. 54a-55a). On August 1, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 7, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In 2000, wildfires burned approximately 74,000 acres on the Lolo National Forest in western Montana. Pet. App. 3a. Respondent Forest Service developed the July 2002 Lolo National Forest Post Burn Project (Post-Burn Project) to deal with the aftermath of the fires by treating 4500 of those acres. Respondent Ecology Center, Inc., filed a suit against the federal respondents pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, challenging the Post-Burn Project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.* Pet. App. 3a.[1] Petitioners intervened as defendants. The district court granted summary judgment to the federal respondents and to petitioners. *Id.* at 40a-53a. A divided panel of the Ninth Circuit reversed and remanded. *Id.* at 1a-37a.

1. a. NEPA requires that federal agencies prepare an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). NEPA is a procedural statute and does not mandate a particular substantive result. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

b. NFMA governs the Forest Service's management of the National Forest System. See generally *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728 (1998).

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[1] The federal respondents are Deborah L. R. Austin, in her official capacity as Forest Supervisor for the Lolo National Forest, Abigail Kimbell, who succeeded defendant Bradley Powell as Regional Forester for Region One of the Forest Service, and the Forest Service, an agency of the United States Department of Agriculture.

NFMA directs the Forest Service to develop a land and resource management plan (forest plan) for each unit of the system to provide for the multiple use and sustained yield of the various natural resources, including timber and wildlife. See 16 U.S.C. 1604(a) and (e). A forest plan is a broad, long-term programmatic planning document that establishes the goals and objectives for units of the National Forest System. Such a plan guides management of forest resources, ensuring consideration of both economic and environmental factors. 16 U.S.C. 1604(g)(1)-(3). NFMA also directs the Secretary to specify guidelines for forest plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B).

c. Judicial review of a Forest Service decision approving a project is governed by the APA, which permits a court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). As this Court has often explained, while a court's inquiry must be thorough, the APA's standard of review is highly deferential and narrow. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court's inquiry is limited to whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 105 (1983).

2. Following the 2000 fires on the Lolo National Forest, many of the Forest's resources were left in an unacceptable condition and susceptible to further degradation, through more fires or insect infestation, in the

absence of management intervention. Pet. App. 3a; C.A. Forest Service Supp. E.R. 115 (Supp. E.R.). The Forest Service therefore developed a project to address those conditions. After publication of a draft environmental impact statement and extensive public involvement and comment, the Forest Service issued a final environmental impact statement (FEIS) for its proposal in July 2002. *Ibid.* The FEIS identified and gave detailed analysis to four alternative courses of action to rejuvenate the Lolo National Forest's resources, and it analyzed the benefits and risks of each alternative. Supp. E.R. 47-50.[2] The FEIS for the project exceeds 1900 pages, with more than 250 pages analyzing the affected environment (Chapter 3), 160 pages analyzing the environmental consequences (Chapter 4), and 150 detailed maps. See Pet. App. 27a (McKeown, J., dissenting).[3]

In a July 2002 Record of Decision, the Forest Service selected a slightly modified version of FEIS Alternative 5 as the Post-Burn Project. Pet. App. 3a. The Post-Burn Project included a number of activities to improve the condition of the Lolo National Forest. One set of activities included the treatment of old-growth and potential old-growth stands of trees. *Id.* at 6a-7a. Those treatments involve the thinning of small-diameter, non-old-growth trees to better replicate the forest's historic structure. *Ibid.* The Forest Service concluded that such thinning would reduce the risk of stand-destroying fires

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[2] One of those alternatives was a "no action" alternative under which the Forest Service would conduct no post-burn management. Two additional alternatives were considered, but eliminated from detailed study.

[3] The overall administrative record includes more than 20,000 pages of supporting information. See Pet. App. 27a (McKeown, J., dissenting).

and bark-beetle infestation, thereby providing for the enhancement of existing old-growth stands and recruitment of new ones, as well as a reduction in the risk that existing old-growth stands would be lost to fire or insects. *Id.* at 6a; *id.* at 34a-35a (McKeown, J., dissenting); Supp. E.R. 156-157, 172-173, 211-219, 238-239, 647, 688.

In September 2002, respondent Ecology Center filed an administrative challenge to the Forest Service's Record of Decision. After its administrative appeal was denied, Ecology Center filed suit in the United States District Court for the District of Montana, alleging that the Post-Burn Project violated NFMA and NEPA. Pet. App. 3a, 40a-41a.

3. The district court rejected Ecology Center's claims. Pet. App. 40a-53a. The court concluded that "[t]he record demonstrates that the [Forest Service] took the requisite hard look at the impacts of this project on both the animal species at issue, and on old growth and soil conditions." *Id.* at 49a. The court noted that "[t]he Forest Service considered the impacts of this project on the goshawk, pileated woodpecker, and black-backed woodpecker" and "concluded that the proposed activities would have no cumulative negative impacts, based on the evidence in the record before the agency." *Ibid.* (citations omitted). The court also observed that the Forest Service "evaluate[d] current and historical soil conditions on the Lolo National Forest and identifie[d] the predicted impacts of the Project on those conditions." *Ibid.*

The district court viewed Ecology Center's arguments as "disput[ing] management decisions of the Forest Service." Pet. App. 50a. The court noted that it "[wa]s not in a position to settle scientific disputes," and

concluded that "[i]f opinions of experts conflict, as the record before the Court suggest[ed], the Court defers to the expertise of the agency." *Ibid.*

4. A divided panel of the Ninth Circuit reversed and remanded. Pet. App. 1a-37a.

a. The court first concluded that the Forest Service's decision to remedy uncharacteristic forest development and to reduce the risk of fires and insect infestation through the old-growth treatment measures was arbitrary and capricious. *Id.* at 6a-12a. The court acknowledged that the Forest Service had "cite[d] a number of studies that indicate such treatment is necessary to correct uncharacteristic forest development resulting from years of fire suppression," and that the Post-Burn Project "is designed to leave most of the desirable old-growth trees in place and to improve their health." *Id.* at 6a. The court further acknowledged that "Ecology Center does not offer proof that the proposed treatment causes the harms it fears" to old-growth habitat and species that are dependent on that habitat. *Id.* at 7a. Nevertheless, expressing the view that the Forest Service did "not offer proof that the proposed treatment benefits—or at least does not harm—old growth dependent species," the court accepted Ecology Center's argument that the Forest Service "cannot be reasonably certain" that treating the old-growth habitat would be consistent with a mandate the court perceived in NFMA to ensure species diversity and viability. *Id.* at 7a-8a; see *id.* at 8a-11a.

In so holding, the court rejected the Forest Service's reliance on evidence in the administrative record that supported its conclusion, as well as the Service's choice of scientific methodology to reach that conclusion. Pet. App. 8a. The court recognized that the Forest Service

had relied upon a study documenting that two old-growth-dependent species were observed foraging elsewhere in "treated old-growth forest," and had concluded that the treatment of old-growth forest would not substantially affect such species because—

> (1) it has observed the short-term effects of thinning old-growth stands via commercial logging and prescribed burning on forest composition, (2) it has reason to believe that certain old-growth dependent species would prefer the post-treatment composition of old-growth forest stands, and (3) its assumption that treatment does not harm old-growth dependent species is therefore reasonable.

*Ibid.* The court, however, dismissed this determination as "an unverified hypothesis," because, in the court's view, the Forest Service had failed to engage in sufficient "on the ground analysis" to test its rationale. *Id.* at 9a (quoting *Lands Council* v. *Powell*, 379 F.3d 738, 752 (9th Cir. 2004), amended, 395 F.3d 1019 (9th Cir. 2005)). The court reasoned:

> Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.

*Ibid.* For similar reasons, the court concluded that the Forest Service's decision violated NEPA with respect to treatment of old-growth forests. *Id.* at 11a-12a.

b. The court of appeals next concluded that the Forest Service violated NFMA and NEPA by failing to ex-

amine adequately the Post-Burn Project's potential impact on the black-backed woodpecker, a species that inhabits post-burn areas. Pet. App. 12a-18a. Although the court recognized that the 2000 fires had greatly expanded the potential habitat available for the black-backed woodpecker and that only limited timber activity would occur in the identified potential habitat, *id.* at 14a,[4] the court concluded that "[t]o be reasonably certain that the post-Project habitat levels would be sufficient to ensure species viability, one must know where the threshold between 'critical' and 'sufficient' levels of burned habitat lies." *Id.* at 16a. Because the Forest Service had not identified the "threshold" the court believed to be necessary, the court held that there was an insufficient basis for the Forest Service's conclusion that the Post-Burn Project would not adversely affect the viability of the black-backed woodpecker. *Id.* at 16a-18a.

c. Finally, the court of appeals concluded that the Forest Service's soil-quality analysis was inadequate. Pet. App. 18a-25a. According to the court, the methodology used by the Forest Service—which included "estimat[ing] soil conditions on the basis of maps, samples from throughout the Forest, aerial reconnaissance, and computer modeling"—"was insufficiently reliable." *Id.* at 19a. In the court's view, the Forest Service engaged in insufficient on-the-ground observations of soil conditions within the Post-Burn Project area. *Id.* at 25a. The court also faulted the Forest Service's conclusion

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[4] As authorized by the Record of Decision, the Post-Burn Project included salvage harvesting in 815 acres of the 9870 acres of potential black-backed woodpecker habitat created by the 2000 fires. As a result of a settlement in other litigation challenging the Post-Burn Project, *Sierra Club, Inc.* v. *Austin*, 82 Fed. Appx. 570 (9th Cir. 2003), the 815 acres was reduced to 155 acres. Pet. App. 4a n.1, 14a & n.5.

that it was meeting soil quality standards because in the court's view the analysis should have included more information, such as the qualifications of the soil scientists conducting the analysis, more information on the methodology utilized, and discussion of how field observations confirmed the Forest Service's estimates. The court found that this information was necessary for the Forest Service to "be certain" that the Post-Burn Project complies with NFMA. *Id.* at 22a-24a.

d. Judge McKeown dissented. Pet. App. 26a-37a. In her view, the majority's approach "represents an unprecedented incursion into the administrative process." *Id.* at 27a. She criticized the majority for changing the court's "posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." *Id.* at 28a. That approach, she concluded, was contrary to "two firmly established lines of precedent in administrative law." *Id.* at 36a. First, she observed that the "arbitrary and capricious" standard of review does not countenance "flyspeck[ing] the agency's analysis," such as "rejecting the Forest Service's soil analysis field checks and its observations and historical data in treated old-growth forests." *Ibid.* Second, she believed that the "majority's rationale cannot be reconciled with our case law requiring '[d]eference to an agency's technical expertise and experience,' particularly 'with respect to questions involving engineering and scientific matters.'" *Id.* at 36a-37a (citations omitted).

## DISCUSSION

We agree with petitioners that the court of appeals' decision is in error in a number of important respects. The federal respondents did not file their own petition

because, *inter alia*, it is not yet clear whether the approach articulated by the Ninth Circuit, in fact, introduces a new and even more stringent standard of review in land-management cases under the APA than the Ninth Circuit has applied in recent years. Nevertheless, the fact remains that the Ninth Circuit impermissibly second-guessed scientific judgments of a federal agency that were amply supported by the administrative record and departed from the standards this Court has held to be applicable to agency factual and scientific judgments under the APA. Accordingly, the federal respondents do not oppose the petition for a writ of certiorari.

1. The court of appeals' decision is incorrect, and the approach the court used to review the Forest Service's Post-Burn Project is mistaken.

a. As the dissenting judge recognized (*e.g.*, Pet. App. 27a, 36a-37a), the court of appeals intruded substantially into the Forest Service's decision-making process in a manner that departs markedly from the arbitrary-and-capricious standard of review called for by the APA. The Ninth Circuit repeatedly referred, for example, to whether the evidence was sufficiently strong to allow the Forest Service—or indeed the court of appeals itself—to be "certain" or "reasonably certain" that the Post-Burn Project would not cause the adverse effects feared by respondent Ecology Center. *Id.* at 8a, 16a, 18a, 22a. Nothing in NFMA or the APA requires that degree of certitude concerning the impact on certain selected resources before a land-management agency can act. Moreover, although the court acknowledged that Ecology Center offered no proof that its posited fears with respect to the treatment of the identified old-growth stands would be realized, *id.* at 7a, the court nevertheless rejected the Forest Service's reasoned and record-

based decision to treat those stands. While recognizing the "scientific uncertainty surrounding the treatment of old-growth stands," the court rejected the Forest Service's decision in the face of that uncertainty as resting on an "unverified hypothesis," *id.* at 9a, and placed the burden on the agency to disprove Ecology Center's claims in court. *Id.* at 7a-8a.

In so doing, the court imposed its own judgment as to how much information is useful or desirable for an agency to have in hand before the agency decides on a particular course of action in the face of scientific uncertainty. Pet. App. 7a-8a. For example, the court concluded that the Forest Service had not engaged in what the court deemed to be sufficient "on the ground analysis" with respect to treating the old-growth stands, *id.* at 9a, or collected sufficient "on-site" soil samples to assess the Post-Burn Project's potential effect on soil quality. *Id.* at 22a-24a. In essence, the Ninth Circuit established its own "bright-line rules, such as requiring an on-site, walk the territory inspection," and "assesse[d] the detail and quality of the analysis—even in the absence of contrary scientific evidence in the record." *Id.* at 29a-30a (McKeown, J., dissenting).

The court of appeals' improper impositions on the agency's decisionmaking process is epitomized by its wholly inapposite reliance on the standards for clinical trials of new drugs. See Pet. App. 9a. The majority faulted the Forest Service for not undertaking a comparable analysis before it took any action in the 74,000-acre burn area. *Ibid.* But, as the dissent explained, the statutory and regulatory regime applicable to the "FDA process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and

medical devices." *Id.* at 36a. "Neither NEPA nor NFMA serve that function in the environmental context," *ibid.*, and neither statute, much less the APA, contains any requirements remotely similar to the rigorous statutory and regulatory requirements that must be met before marketing a new drug. It therefore is plainly inappropriate to import the notion of clinical trials, and the proofs that those entail, to the very different and difficult task of managing federal lands for multiple uses and sustained yield in a dynamic environment. *Ibid.*; see Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528. "'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). That is especially so where, as here, circumstances required a prompt affirmative response by the Forest Service to prevent further deterioration in forest conditions. In short, nothing in the highly deferential standard of APA judicial review of decisions under NFMA and NEPA warrants imposition by the courts of the sort of heightened requirements on which the court of appeals relied.

In addition, the court of appeals misstated NFMA's substantive mandate. See Pet. App. 6a, 8a. NFMA directs the Secretary to specify guidelines for forest plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B). The government agrees with petitioners (Pet. 17-19) that NFMA itself does not contain a "viability" requirement. See *Sierra Club* v. *Marita*, 46 F.3d 606, 620 (7th Cir. 1995). A provision to manage habitat to maintain viable populations of certain

species was once found in NFMA regulations that were originally promulgated in 1982, but those regulations have since been superseded. Compare 36 C.F.R. 219.19 (2000) (last codification of the 1982 NFMA regulations), with 36 C.F.R. Pt. 219 (2005). It is true that the forest plan in this case provided for management of resources to maintain population viability of certain "sensitive" species. Supp. E.R. 573; see Pet. App. 18a. But the court of appeals exceeded the scope of its authority in holding that the Forest Service's decision that the Post-Burn Project would not undermine the viability of one such species, the black-backed woodpecker, was arbitrary and capricious, because the 2000 fire created a substantial amount of new post-fire habitat for that species. See *id.* at 14a. Contrary to the court of appeals' view (*id.* at 16a-17a), in light of that greatly increased habitat, nothing in NFMA or NEPA required the Forest Service to specify a particular threshold below which the viability of the black-backed woodpecker would be jeopardized in order to conclude that the modest timber harvesting (with mitigation measures) in the project at issue here would *not* have that effect. And the court's imposition of that requirement was in any event based on the court's further (and unwarranted) insistence that the Forest Service must be "reasonably certain" of its scientific judgments. See *id.* at 16a.[5]

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[5] Although the Forest Service defended its July 2002 Record of Decision under the 1982 regulations, the Forest Service subsequently clarified in September 2004 that the 1982 regulations did not apply to site-specific decisions that were made after the 1982 regulations were superseded but under a forest plan adopted while the 1982 regulations were still in effect; rather, regulations promulgated in 2000 (which have themselves since been superseded) governed. 69 Fed. Reg. 58,057 (2004). The 2000 regulations required the agency to "consider the best

b. The proper inquiry under the APA is whether the agency acted arbitrarily or capriciously on the basis of the administrative record, including the comments submitted to it during the administrative process. Under this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), the development of procedures, determinations as to what evidence to seek, and decisions about how much evidence is sufficient in a particular case to warrant going forward, are within the province of the agency, not the reviewing court. *Id.* at 543.

That is particularly true with respect to the types of scientific judgments at issue here. The court of appeals should have deferred to the agency's largely predictive scientific judgments within its area of expertise. See *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983) (where an agency "is making predictions, within its area of special expertise, at the frontiers of science," and the reviewing court is called on to examine "this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential"). The Forest Service was faced

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available science when implementing * * * the plan." 36 C.F.R. 219.35(a) and (d) (2001). Neither the courts below nor any party took issue with the agency's reliance in this case on the 1982 regulations, inasmuch as the project was required to be consistent with the forest plan, which was adopted under 1982 regulations and therefore contained a parallel provision for maintaining the viability of certain species. See 16 U.S.C. 1604(i).

with a deteriorating situation because of the prospect of disease or fire that would harm the forest and the species that depend upon it. See Pet. App. 34a-35a (McKeown, J., dissenting) (observing that it was uncontroverted that "inaction may harm old-growth areas"). The agency had to act, even in the face of uncertainty, relying on the information it had in hand.

Moreover, the Forest Service's decision at issue here was rendered at the conclusion of an agency proceeding in which the Federal Rules of Evidence and other formal judicial-type procedures do not apply. For that reason, as well, and especially in light of the deference owed to an agency's scientific judgments, the court of appeals had no authority under the APA's arbitrary-and-capricious standard of review to impose its own standards for, *e.g.*, the reliability and verification of scientific or other studies and evidence, see Pet. App. 8a-11a, 14a, 16a, 20a-21a & n.13, 24a, the methodology used to determine whether the Post-Burn Project would threaten the viability of a sensitive species, see *id.* at 16a-17a; see pp. 7-8, *supra*, or the qualifications and documentation practices of agency personnel who conduct surveys, see *id.* at 23a-24a.

Under the APA, the court in a case such as this must limit its review of the Forest Service's factual conclusions to whether those conclusions are supported by "substantial evidence" in the administrative record. Under the APA's arbitrary-and-capricious standard of review, "substantial evidence" is the most stringent standard that could apply to questions of evidentiary sufficiency for factual determinations. See *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999); see also, *e.g.*, *Utah Shared Access Alliance* v. *Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006); *Association of Data Processing*

v. *Board of Governors*, 745 F.2d 677, 683-684 (D.C. Cir. 1984) (Scalia, J., joined by R.B. Ginsburg, J.). That standard is more deferential even than the "clearly erroneous" standard for appellate review of trial court findings. *Zurko*, 527 U.S. at 162, 164. Under the substantial-evidence standard, an agency's fact-based conclusion must be sustained unless no reasonable fact-finder could have reached that conclusion based on the administrative record. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992). Under that standard, the evidence in an administrative record is sufficient to sustain an agency's fact-based decision if the evidence is such that it would justify, in a jury trial, a refusal to take a factual decision away from the jury. See *Illinois Cent. R.R.* v. *Norfolk & W. Ry.*, 385 U.S. 57, 66 (1966) (quoting *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)); see also *Zurko*, 527 U.S. at 162; *Elias-Zacarias*, 502 U.S. at 481.

If the Forest Service's decision and the administrative record had been viewed under that standard, its decision to proceed with the Post-Burn Project clearly should have been sustained. As Judge McKeown concluded, the administrative record is "huge," including "a 1900+ page [FEIS], 150 detailed maps and 20,000 pages of background information," Pet. App. 27a, and that record amply supports the agency's conclusions, *id.* at 29a-31a, 34a-35a. The record evidence was more than sufficient with respect to each of the issues on which the court of appeals faulted the agency's decision to withstand review under the substantial-evidence/directed-verdict standard of review under the APA.

2. The Ninth Circuit has improperly second-guessed an important agency decision with respect to scientific judgments that were the subject of a lengthy and in-

depth deliberation and review. The government remains firmly of the view that the Forest Service's decision was in full compliance with both NFMA and NEPA and is amply supported by the administrative record. If this Court is inclined to grant the petition, the federal respondents would support petitioners on the merits.

Nonetheless, the government did not file its own petition for a writ of certiorari. Precisely because the Ninth Circuit's decision represents a substantial deviation from well-settled modes of review of administrative decisionmaking, it is in tension with, but not clear conflict with, decisions of other courts of appeals. No other circuit has expressly considered and rejected the Ninth Circuit's approach with respect to, *e.g.*, whether the agency or reviewing court must be "certain" or "reasonably certain" about possible impacts of its decisions, or the possible need for studies analogous to clinical trials for new drugs. Nor is it clear that the Ninth Circuit has adopted that standard as a distinct, new rule of law, so much as it has drifted away even further from the kind of deferential review that this Court has made clear should govern judicial review of agency actions. The degree to which the Ninth Circuit will apply this plainly erroneous approach as a distinct test in future cases, or to which this case may instead be an aberration, remains to be seen. Accordingly, the government had concerns whether this case precisely satisfies the Court's traditional criteria for plenary review.

That said, if the decision here does represent the enunciation of new standards that the Ninth Circuit will use to review scientific judgments in agency decisions, the decision will have significant negative implications for the implementation of federal land-management programs. The Ninth Circuit encompasses 122.2 million of

the 192.7 million acres of National Forest System lands, see http://www.fs.fed.us/land/staff/lar/LAR05/table1.htm, http://www.fs.fed.us/land/staff/lar/LAR05/table6.htm (last modified Sept. 2005), and an additional 197.3 million acres of public lands under the jurisdiction of the Bureau of Land Management. See 190 Bureau of Land Management, DOI, *Public Land Statistics 2005*, BLM/BC/ST-06/001+1165 (June 2006), available at http://www.blm.gov/natacq/pls05/pls1-3_05.pdf. The court's clear deviation from established precedent of this Court thus could have great practical significance given the vast expanse of federal lands and the numerous planned and potential federal projects located within the Ninth Circuit.

## CONCLUSION

The federal respondents do not oppose the petition for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2006

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IN THE

# Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES, and TRICON TIMBER LLC,

*Petitioners*,

*v.*

ECOLOGY CENTER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Whether viewed as imposing procedural and substantive requirements upon the Forest Service not found in the National Environmental Policy Act or National Forest Management Act as petitioners argue, or as a failure to apply the proper standard of review under the Administrative Procedure Act as federal respondents argue, or as improperly imposing upon the Forest Service the burden of proof to justify its land management actions as amici argue – all of which amount essentially to the same thing – the decision of the Ninth Circuit Court of Appeals misinterpreted the law in a way that straitjackets federal agency decisionmakers in managing western national forests to improve forest health and reduce the risk of loss from catastrophic wildfire and insects. From petitioners' perspective, then, the issue is not whether the court of appeals misinterpreted and misapplied the law; rather, the issue is whether this case presents a proper vehicle for the Court to exercise its supervisory powers by instructing the Ninth Circuit on the limits of judicial interference in agency land management decisionmaking. Because respondent Ecology Center has offered neither a persuasive reason for this Court to deny Mineral County's petition nor an effective rebuttal to the compelling reasons offered in support of review, which reasons are summarized below, the Court should grant petitioners' request and issue a writ of certiorari.

First, the Ninth Circuit has decided an important federal question about the degree of deference owed to Forest Service land management decisions in the face of scientific uncertainty in a way that conflicts with relevant decisions of this Court. Scientific certainty is not a prerequisite for making decisions under the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA") or the Administrative Procedure Act ("APA"), nor is it a standard by which NEPA and NFMA decisions should be judged. This Court held in *Baltimore Gas & Elect. Co. v. NRDC, Inc.*, 462 U.S. 87 (1983), that a reviewing court should "be at its most deferential when the agency is making predictions, within its area of special

expertise, at the frontiers of science." *Id.* at 103. An agency's exercise of discretion in matters involving a high level of technical expertise is entitled to substantial deference. *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989). This Court has not held, as the Ninth Circuit did in this case, that before a land management agency can act, it must verify its management practices with on-the-ground research. Even if one were to accept the Ninth Circuit's premise that the land management practice of thinning smaller trees to reduce the risk of forest losses from wildfire and insects and to help maintain and improve old growth and old growth-dependent wildlife is an "unverified hypothesis," it does not follow that the level of deference due the land management agency would diminish or that the burden of proof would shift to the agency.[1] More fundamentally, the Ninth Circuit's decision ignores the fact that the field of natural resources management is not premised on immutable truths.[2] Indeed, management of public

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1. The Forest Service in fact had direct observational evidence that the proposed stand treatments would have preserved habitat for old growth-dependent species. App. 33a. In contrast, Ecology Center lacked "proof that the proposed treatment causes the harm it fears." App. 7a.

2. Despite a multitude of unresolved scientific issues in the realm of natural resources management, land management activities do not cease pending resolution of all outstanding questions. *See, e.g.*, Clinton T. Moore et al., *Forest Management Under Uncertainty for Multiple Bird Population Objectives, in* USDA Forest Service Gen. Tech. Rep. PSW-GTR-191 373-80 (2005), *available at* http://www.fs.fed.us/psw/publications/documents/psw_gtr191/Asilomar/pdfs/373-380.pdf; James D. Nichols et al., *Managing North American Waterfowl in the Face of Uncertainty*, 26 Annu. Rev. Ecol. Syst. 177-99 (1995), *available at* http://www.fws.gov/migratorybirds/reports/ahm02/nichols-johnson-williams-1995.pdf; Jonathan Thompson, *Acting on Uncertainty in Landscape Management-Options Forestry*, 78 Science Findings Pacific Northwest Research Station 1, 5 (2005) ("'In the end, we hope that forest management can be viewed as a never-ending set of questions rather than a series of disconnected truths.'"), *available at http://www.fs.fed.us/*

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lands would grind to a halt if all forest management hypotheses had to be verified prior to implementation. Forest science is constantly evolving, and federal land managers must be able to make decisions based upon the available information. Thus, as the dissent noted, the opinion represents an "unprecedented incursion into the administrative process" that "ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service" and replaces the arbitrary and capricious standard of review with a "more demanding [verified scientific evidence] standard." App. 27a (McKeown, J., dissenting). Although such an exacting standard may have a statutory (and commonsense) basis in the context of approving drugs meant for human consumption, *see* App. 9a, that standard never before has governed federal forest management decisions, particularly those made in the face of scientific uncertainty and where, as here, significant environmental risks are associated with non-action. App. 35a ("Old-growth areas 'are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires.' Inaction or delay threatens the species Ecology Center seeks to protect.") (McKeown, J., dissenting). *See also* Stephen Breyer, *Vermont Yankee and the Court's Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833 (1978) (discussing uncertainty in agency decisionmaking, and the proper scope of judicial review in light of such uncertainty, in the context of proposed nuclear power plants that would generate hazardous waste requiring new and uncertain long-term storage technologies while at the same time generating health and safety benefits). Moreover, as amici point out, the Ninth Circuit's on-the-ground, verified scientific evidence standard conflicts with the deferential standard of

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*pnw/sciencef/scifi78.pdf; Scientific Personnel & Current Studies*, Rocky Mtn. Research Station., RWU-RM-4251 1, 5 (2006) ("Research Problem #1: Understand ecological tradeoffs of vegetation management options for managing wildfires and reducing risks on wildlife."), *available at* http://www.rmrs.nau.edu/lab/4251/FY06_book.pdf.

review applied in other circuit courts of appeal. Brief Amicus Curiae ("Amici Br.") at 15-18. For example, the D.C. Circuit Court of Appeals has emphasized that "'[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review' . . . and need not rest on 'pure factual determinations.'" *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (citations omitted).

Second, aside from the more general federal question of deference to agency land management decisions in the face of scientific uncertainty, this case raises the important question of whether the Forest Service can proceed promptly with hazardous fuel reduction projects on national forests to reduce the risk of catastrophic wildfire. Catastrophic wildfire is a costly national problem, both from a monetary and a non-monetary resource perspective. Petition for Writ of Certiorari at 9 n.1. Since 2002, the estimated annual federal expenditures on fighting wildfires has averaged more than one billion dollars.[3] *Wildland Fire Statistics, available at http://www.nifc.gov/stats/suppression_costs.html* (last visited Dec. 4, 2006). The Ninth Circuit's opinion significantly constrains the Forest Service's ability to reduce unprecedented fuel loads in forests throughout the western states. *See, e.g., Healthy Forests-An Initiative for Wildfire Prevention and Stronger Communities* (2002) (explaining that "[a]bout 190 million acres of federal forests and rangelands in the lower 48 states face high risk of catastrophic fire due to deteriorating

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3. The amount of forest and rangeland destroyed by wildfires is at an all time high. *Climate of 2006 Wildfire Season Survey*, National Climatic Data Center ("The preliminary number of acres burned so far this year in the U.S. is a record for an entire year."), *available at* http://www.ncdc.noaa.gov/oa/climate/research/2006/fire06.html (last visited Dec. 4, 2006). Wildfires also are becoming a major emission source of carbon dioxide. *See, e.g.*, http://www.ucar.edu/communications/newsreleases/2004/acme.shtml (amount of carbon dioxide released from forests burned in Colorado during 2002 "equaled an entire year's emissions from statewide transportation activities") (last visited Dec. 4, 2006).

ecosystem health and drought. For instance, many ponderosa pine forests are 15 times more dense than they were a century ago. Where 25 to 35 trees once grew on each acre of forest, now more than 500 trees are crowded together in unhealthy conditions"), *available at* http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf. Although the heavy fuel loads are a problem throughout the west, fuel loading is of particular concern to petitioner Montana Coalition of Forest Counties, whose constituent counties are dominated by federal forestlands on which officials are powerless to take action for the protection of county residents.

Third, the Ninth Circuit's decision is contrary to this Court's admonition that it is not for courts to impose on federal agencies additional procedural requirements not found in NEPA. Respondent Ecology Center asserts that the Ninth Circuit's decision is nothing more than an unremarkable, garden variety NEPA opinion because, according to respondent, NEPA itself forbids the "preparation of a document based on an unverified, unresearched hypothesis." Respondent's Brief in Opposition ("Resp't Br.") at 6. Mineral County agrees that the Ninth Circuit opinion stands for the proposition that an environmental impact statement "based on an unverified . . . hypothesis" is invalid; however, Mineral County strongly disagrees that this is a correct statement of NEPA law. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 548 (1978) ("[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act.") (citing *Kleppe v. Sierra Club*, 420 U.S. 390, 405-06 (1976)); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353-59 (1989) (rejecting Ninth Circuit's effort to impose additional requirements on agency beyond those found in NEPA). The Ninth Circuit ignored this Court's teachings by requiring the Forest Service to field verify soil conditions on all harvest units before completing its environmental impact statement, and it did so even though each harvest unit would have been ground truthed as part of the

project's mitigation prior to harvest being permitted. App. 22a-25a. The Ninth Circuit also imposed a procedural requirement found neither in NEPA nor NFMA by requiring as a prerequisite to treatment conclusive research on the effects of treating old growth habitat via the removal of smaller trees to reduce wildfire danger.[4]

Fourth, the Court should correct the Ninth Circuit's erroneous interpretation of NFMA, which engrafted a wildlife viability "mandate" into the statute's diversity provision contrary to the law's plain language. See 16 U.S.C. § 1604(g)(3)(B). This is an important question of federal law that should be settled by this Court. By finding a viability mandate in the murky text of NFMA's diversity provision, the Ninth Circuit has constrained the Forest Service's discretion to manage national forests to achieve other proper objectives, such as reducing the risk of insect epidemics and catastrophic wildfire per Congress' explicit instruction in NFMA and the Healthy Forests Restoration Act of 2003 ("HFRA"). *See, e.g.*, 16 U.S.C. § 1604(m)(1) (stating that NFMA "shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially

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4. Although respondent Ecology Center argues that a writ of certiorari is not warranted because the NEPA implementing regulations already address how agency analysis should proceed in the face of scientific uncertainty, Resp't. Br. at 7 (citing 40 C.F.R. § 1502.22(a)), the fact is that the Forest Service's environmental impact statement addressed uncertainty and specifically analyzed the effects of treatment on the goshawk and pileated woodpecker, the two old growth-related species at issue in the case. SER 240-247. Indeed, as part of the analysis, the EIS contained alternatives that included no harvest in old growth stands. *Id.* For those alternatives that allowed the harvest of old growth habitat, treatment was minimal, leaving the Forest Service to conclude that there would be only a minor impact. See SER 242 ("This alternative would treat approximately 67 acres of vegetation in potential goshawk habitat in seven stands. Because the vegetation treatments would be designed to promote old growth with an open understory and because the treatment would involve only about 2% of potential habitat, this alternative would have no impact on goshawk habitat").

damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack"); 16 U.S.C. § 6501 (stating that HFRA's purposes include such things as reducing wildfire risks on federal lands and increasing carbon sequestration).

Respondent Ecology Center argues that the Ninth Circuit correctly held that NFMA required the underlying project to contain measures to maintain wildlife viability because the Lolo Forest Plan requires that animals be managed to maintain population viability, and NFMA requires that projects be consistent with the Forest Plan. Resp't Br. at 16 (citing 16 U.S.C. § 1604(i)). Respondent concludes that because the "decision construes regulations that apply to a small set of the Service's actions, the practical application of a decision in this case is necessarily limited to plans and projects governed by the now repealed regulations." *Id.* at 17. However, the Ninth Circuit's opinion does not interpret the governing Forest Plan or the NFMA regulations but instead explicitly cites to NFMA's diversity provision, 16 U.S.C. § 1604(g)(3)(B), as the source from which the supposed viability mandate springs. Nowhere does the opinion reference the regulation, 36 C.F.R. § 219.27, or the Forest Plan as the basis for the viability mandate.[5]

Resolving the meaning of the diversity statutory language is not a mere academic exercise over an inconsequential legal

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5. Respondent Ecology Center cites to *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 861-62 (7th Cir. 2003), for the proposition that the Seventh Circuit has found a viability mandate in NFMA. Resp't Br. at 17-18. However, the Seventh Circuit's discussion of wildlife viability was based on the NFMA regulations, not the diversity provision of 16 U.S.C. § 1604(g)(3)(B). In fact, the Court in *Indiana Forest Alliance* upheld a Forest Service decision after deferring to the opinions of Forest Service experts, noting that "scientific dispute is part of the every day existence for agencies involved in environmental projects." *Id.* at 861. Unlike the Ninth Circuit, the Seventh Circuit simply does not read the statutory diversity provision of NFMA as establishing a wildlife viability mandate. See *Sierra Club v. Marita*, 46 F.3d 606, 620 (7th Cir. 1995).

issue. Although the wildlife viability regulation has been superseded, see 70 Fed. Reg. 1023 (Jan. 5, 2005), 36 C.F.R. § 219.14(f) (2005), the new regulatory structure is being challenged in *Citizens for Better Forestry v. U.S. Dept. of Agric.*, Civ. No. C 05-1144 PJH (N.D. Cal. filed March 21, 2005) (complaint available on PACER from Northern District of California website). More fundamentally, the Ninth Circuit found the viability mandate in NFMA *per se*, which ultimately governs Forest Service actions independent of any change to the regulations.

Finally, federal respondents state that it remains to be seen whether the Ninth Circuit's decision to impose heightened scrutiny of agency decisions under NEPA and NFMA is an aberration. Brief for Federal Respondents at 17. Respectfully, Mineral County disagrees. *See, e.g., Idaho Sporting v. Rittenhouse*, 305 F.3d 957, 975-76 (9th Cir. 2002) (Thompson, J., dissenting) (objecting to majority's demand for detailed wildlife viability analysis where a timber sale would not have depleted wildlife habitat); *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005) (requiring detailed analysis of all past actions in a watershed over several decades, including the "time, type, place, and scale of past timber harvests," to satisfy NEPA, rather than focusing on the relevant environmental manifestations of past harvests). *See also* Amici Br. at 8 n.9. As the amici explain, the Ninth Circuit reverses district court interpretations of NEPA and NFMA more than any other circuit court. Amici Br. at 7-9. Moreover, the Ninth Circuit's decision comes at a time of urgent need to reduce heavy fuel loads in overstocked western federal forests so as to maintain those forests for the benefit of human and non-human species alike. The opinion thus represents a watershed mark in the Ninth Circuit's ongoing quest to impose expansive data and analytical burdens on federal land management agencies. This Court should turn back the tide.

## CONCLUSION

For the foregoing reasons, Mineral County respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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(3)

No. 06-344

IN THE
Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES and TRICON TIMBER LLC,

*Petitioners,*

*v.*

ECOLOGY CENTER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF *AMICUS CURIAE* OF AMERICAN FOREST RESOURCE COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, ALASKA FOREST ASSOCIATION, ASSOCIATED OREGON LOGGERS, CALIFORNIA FORESTRY ASSOCIATION, INTERMOUNTAIN FOREST ASSOCIATION, MONTANA LOGGING ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION, NORTHWEST MINING ASSOCIATION AND WASHINGTON CONTRACT LOGGERS ASSOCIATION IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Does the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., or the National Forest Management Act, 16 U.S.C.§1604(g)(3)(B), impose on the U.S. Forest Service a procedural requirement to conduct long-term, on-the-ground research to definitively conclude there will be beneficial effects to wildlife from thinning trees in old growth stands before deciding to conduct such a project to improve forest health, reduce the risk of wildfire and safely reintroduce prescribed fire?

2. Does the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., impose on the U.S. Forest Service a procedural and substantive requirement to collect on-site soil data for every timber harvest unit before it completes the final environmental impact statement?

3. Does the National Forest Management Act, 16 U.S.C.§1604(g)(3)(B), impose a "mandate to maintain wildlife viability" on the U.S. Forest Service?

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## INTEREST OF *AMICI CURIAE*[1]

The Ninth Circuit 2-1 decision in this case creates an intrusive new standard for judicial review of federal agency action under the Administrative Procedures Act (APA), 5 U.S.C. §706(2)(A) – which abandons the deference to agencies commanded by this Court's well-settled precedents. This new standard gives courts in the nine-state region unprecedented power to overturn U.S. Forest Service decisions approving ecosystem restoration, fire management, timber, mining and grazing projects on the 122 million acres[2] of the national forest system located in the nine-state region.

This ruling, based on the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., and the National Forest Management Act (NFMA), 16 U.S.C.§§1601 et seq., is certain to accelerate the current flood[3] of environmental litigation in the Ninth Circuit that has resulted from a series of recent Ninth Circuit decisions under NEPA, NFMA and other federal environmental laws. Many of these recent NEPA and NFMA decisions, which (at least as of now) reach an apogee with this case, have compelled the Forest Service to repeatedly revise and expand the environmental reviews it conducts before proceeding with each and every one of the thousands of pending and planned land management projects it conducts in the nine-state circuit, often requiring lengthy and expensive new environmental reviews of projects that have already been exhaustively analyzed.

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[1]The parties' letters of consent to the filing of this brief are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

[2]*See* http://www.fs.fed.us/land/staff/lar/LAR04/table4 (last visited November 3, 2006) for documentation of state-by-state acreage.

[3]Westlaw searches show that since January 1, 2002 there have been over 450 district court environmental decisions within the Ninth Circuit – some 250 under NEPA and 200 more under NFMA, the Endangered Species Act, 16 U.S.C. §§1531 et seq., Clean Water Act, 33 U.S.C. §§1251 et seq., or Federal Land Policy and Management Act, 43 U.S.C. §§1701 et seq., not coupled with a NEPA claim. The pace is accelerating: in 2005 and 2006 there have been over 240 such decisions.

This seemingly-endless analytical loop (often called "paralysis by analysis") has disrupted, delayed and in many cases completely blocked urgent Forest Service ecological restoration projects necessitated by recent catastrophic wildfires in western states and other urgent land management actions, which in turn has threatened severe harm to the environment itself. As the dissenting judge below stated: "Inaction or delay threatens the species Ecology Center seeks to protect [and] may harm old-growth areas." Pet. App. 35a. The very same "inaction or delay" also harms the families, towns and enterprises within the Ninth Circuit who treasure a healthy environment and rely on national forest system resources that the Forest Service has found increasingly difficult to manage properly.

The *amici* represent many of these citizens:

*Amicus* American Forest Resource Council is a trade association based in Portland, Oregon comprised of approximately 90 lumber and plywood manufacturers and forest landowners in the states of Oregon, Washington, Idaho, California, Montana, Arizona and six other western states that rely upon the purchase of timber from the national forest system for some or all of the raw material supply required to operate their processing facilities. Most of its members are family-owned companies, many in the third generation, deeply rooted within the rural communities in which they operate.

*Amicus* American Forest & Paper Association (AF&PA) is a national trade association based in Washington, D.C. comprised of approximately 115 member companies that grow, harvest and process wood and wood fiber from public and private land; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. AF&PA is also the umbrella for more than 60 affiliate member associations around the country that reach out to more than 10,000 companies. Many of its member companies and many more members of its association members rely on the purchase of timber from the national forest system for some or all of the raw material required to operate their facilities, and many forest landowning members rely on timely management of national forest lands to assure that risks from wildfire and insect infestation do not threaten their adjacent land.

*Amicus* Alaska Forest Association is a trade association of about 140 wood product manufacturers, logging and road building companies, marine and surface transportation companies and related enterprises, many family-owned, that operate throughout Alaska including many in Southeast Alaska. Since about 85% of all forest lands in Southeast Alaska are controlled by the Forest Service, many of the association's members rely on the national forest system to provide most or all of the timber required to maintain wood product manufacturing. The welfare of these family-owned businesses is directly related to the Forest Service's ability to actively manage national forest system lands in Alaska.

*Amicus* Associated Oregon Loggers is a trade association of approximately 1,100 contract loggers and businesses associated with the logging industry in Oregon, virtually all family-owned enterprises, who rely on the 15 national forests in the state ( 25% of the state's land base) for a substantial portion of their work and economic livelihoods.

*Amicus* California Forestry Association is a trade association of approximately 200 wood product companies and forest landowners including ninety percent of California's primary forest products manufacturers, who serve as the engine of a forest products industry in California that generates more than $15 billion in annual sales from production and processing and provides total employment exceeding 220,000 workers. Many of its manufacturing members rely on timber from California's 19 national forests (20% of the state's land base) to maintain the economic viability of their timber processing facilities.

*Amicus* Intermountain Forest Association is a trade association of 35 wood product manufacturers, forest landowners and related enterprises, many family-owned, operating in Idaho, Montana, Washington, Oregon and South Dakota. Many of its members rely in particular on timber from the 15 national forests in Idaho (39% of Idaho's land base) and the 11 national forests in Montana (18% of Montana's land base) for a major component of their timber supply.

*Amicus* Montana Logging Association represents nearly 600

family-owned businesses that harvest and/or transport timber from forest to mill in Montana. Since about two-thirds of Montana's forest lands are controlled by the Forest Service, the welfare of these family-owned businesses is directly related to the Forest Service's ability to actively manage national forest system lands in Montana.

*Amicus* Montana Wood Products Association is a trade association of 16 companies and individuals involved in all facets of the wood products industry in Montana and other western states. Its members all have a strong interest in the national forest system because the state, private and tribal lands in Montana can only provide about half of the timber supply needed to maintain the industry in the state.

*Amicus* Northwest Mining Association (NWMA) is a 1,500 member trade association based in Spokane, Washington whose membership encompasses every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services and sales of equipment and supplies. NWMA members operate in each of the nine states within the Ninth Circuit and 22 other states, and are actively involved in exploration and mining operations on national forest system lands, especially in the West.

*Amicus* Washington Contract Loggers Association is a trade association of 980 logging companies who harvest timber on private and public lands in the State of Washington, and have traditionally relied on timber from the nine national forests in the state (21% of the state's land base) to generate a major component of their income.

The *amici* have a strong interest in this case because they and their members are often at the bottom of the environmental litigation food chain, with limited or no right to participate in NEPA lawsuits,[4] but suffering the full brunt of litigation-driven disruptions

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[4]Much of the Ninth Circuit's NEPA jurisprudence has developed at the exclusion of *amici*, their members and others seeking to support federal agency NEPA decisions because the Ninth Circuit has forged a unique rule of law denying district court intervention as of right to *amici* and other citizens who seek to support the government in a NEPA case, except in the remedial phase after a decision on the merits has been rendered. *See, e.g., Wetlands Action Network v. U.S. Army Corps*

in natural resource decision-making. When a national forest is enjoined from selling fire-scarred timber to local sawmills that have no other available wood supply, it is not the Forest Service employees who suffer but rather the men and women working on the mill's "green chain" who see production suspended and their jobs cut, as well as the family-owner of the sawmill who has spent a lifetime supporting his community, creating jobs and supplying the American homebuilding industry. When litigation blocks mining on a national forest, the Forest Service employees still get paid, but the mining company employees and owners lose their livelihood.

## SUMMARY OF ARGUMENT

The Court should grant the petition for review in this case because the Ninth Circuit decision further extends that circuit's increasingly aberrant NEPA jurisprudence, departs from this Court's well-settled precedents, and creates a conflict with nine other circuits by fashioning a new, sharply-reduced standard of deference courts must give predictive scientific judgments of the Forest Service (and presumably other federal agencies) in APA judicial review.

Under the new Ninth Circuit deference standard: 1) a court may give no deference to a predictive scientific judgment of Forest Service experts unless the agency first validates the predictive judgment through "on-the-ground" verification; and 2) a plaintiff is never required to meet any burden of proof, either at the administrative level or in court proceedings, to obtain such non-deferential judicial review.

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*of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001). *Amici* and their members are often barred from participating in NEPA cases in the Ninth Circuit under this rule. *E.g., Oregon Natural Desert Ass'n v. Shuford*, -F.Supp.2d-, 2006 WL 2601073 (D. Or. September 8, 2006); *Sierra Nevada Forest Prot. Campaign v. Tippin*, -F.Supp.2d-, 2006 WL 1319397 (E.D. Cal. May 15, 2006). *Amici*'s inability to participate in lower court NEPA litigation in the Ninth Circuit makes review by this court even more important to protecting their interests.

## REASONS FOR GRANTING THE PETITION

### THE DECISION BELOW FURTHER EXTENDS THE NINTH CIRCUIT'S INCREASINGLY ABERRANT NEPA JURISPRUDENCE BY SEVERELY REDUCING THE DEFERENCE A COURT MUST GIVE A FEDERAL AGENCY'S PREDICTIVE SCIENTIFIC JUDGMENTS, CONTRARY TO THIS COURT'S PRECEDENTS AND IN CONFLICT WITH RULINGS OF NINE OTHER CIRCUITS.

#### A. The Court should exercise its supervisory powers to constrain the remarkable and growing divergence between the Ninth Circuit's aberrant NEPA jurisprudence and the law of all the other circuits.

There is a compelling need for the Court to exercise its supervisory powers to achieve greater uniformity of environmental jurisprudence generally, and NEPA jurisprudence specifically, between the Ninth Circuit and the other circuits. S. Ct. Rule 10(a).

This Court has previously reviewed five Ninth Circuit NEPA decisions – and in all five cases, unanimously reversed the Ninth Circuit ruling.[5] In the same period the Court has reviewed seven other Ninth Circuit environmental decisions, unanimously reversing four of these decisions,[6] reversing two additional decisions with

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[5] *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (NEPA and NFMA); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

[6] *Bennett v. Spear*, 520 U.S. 154 (1997) (Endangered Species Act); *Meghrig v. KFC Western, Inc.*, 516 U.S. 469 (1996) (Resource Conservation and Recovery Act (RCRA), 49 U.S.C. §§6901 et seq.); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987) (Alaska National Interest Lands Conservation Act, 16 U.S.C. §1320); *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) (Clean Water Act).

dissents[7] and affirming just one.[8] Yet this steady stream of corrective review has not constrained the Ninth Circuit from developing, especially in recent years, a uniquely activist environmental jurisprudence under NEPA, NFMA and other laws that contrasts sharply with the law in the other courts of appeals, and fluctuates so rapidly that the district courts within the Ninth Circuit are unable to apply correct legal principles more than half the time.

This divergence is particularly apparent for the Forest Service, which manages national forests in 40 states located in every one of the 11 geographically-based circuits, and is headquartered in Washington, D.C. The Forest Service follows the same laws and regulations in every national forest, relies on a single Office of General Counsel to interpret those laws and regulations, and performs similar land management duties throughout the country. Forest Service managers routinely move from forest to forest and region to region, so there are no regional differences to legal interpretations. Although the Forest Service gets sued in every circuit, its litigation record in the Ninth Circuit is remarkably worse than in the rest of the country.

From January 1, 2002 to November 1, 2006, the Ninth Circuit decided appeals in 37 cases against the Forest Service claiming a violation of NEPA, NFMA or both laws. In the district court, the Forest Service prevailed in 35 of these cases, while citizen litigants won just two. In the Ninth Circuit, however, the citizen litigants were able to win reversal of those district court rulings in 20

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[7] *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 539 (1988) (reversing Ninth Circuit application of Free Exercise Clause to block construction of Forest Service Road); *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (reversing Ninth Circuit preemption ruling concerning Federal Land Policy and Management Act and Coastal Zone Management Act, 16 U.S.C.§§ 1451 et seq.).

[8] *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (affirming Ninth Circuit jurisdictional interpretation of notice provision in RCRA).

cases,[9] w[illegible] the Ninth Circuit affirmed district court rulings for Forest Se[illegible] in only 15 cases.[10] Thus, in more than half the NEPA and NFMA appeals, the Ninth Circuit found that the district court had applied its precedents incorrectly, and in every case ruled against

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[9]*Oregon Natural Desert Ass'n v. U. S. Forest Serv.*, -F.3d-, 2006 WL 2691392 (9th Cir. September 21, 2006); *Earth Island Inst. v. Ruthenback*, 459 F.3d 954 (9th Cir. 2006) (aff'g in part and remanding in part 376 F.Supp.2d 994 (E.D. Cal. 2005)); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006); *Natural Res. Def. Council v. U.S. Forest Serv.*; 421 F.3d 797 (9th Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953 (9th Cir. 2005); *Ecology Ctr. v. Kimbell*, 143 Fed. Appx. 793 (9th Cir. 2005); *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 403 F.3d 683 (9th Cir. 2005); *Headwaters v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005); *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), amending and superseding 379 F.3d 738, 752 (9th Cir. 2004); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2004); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080 (9th Cir. 2003); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003); *Pearson v. Powell*, 96 Fed. Appx. 466 (9th Cir. 2004); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d. 1157 (9th Cir. 2003); *Selkirk Conservation Council v. Forsgren*, 336 F.3d 944 (9th Cir. 2003); *Furey v. U.S.*, 61 Fed. Appx. 399 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002); *Idaho Sporting Cong. v. Alexander*, 45 Fed. Appx. 788 (9th Cir. 2002); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002). All compilations are based on decisions reported in Westlaw.

[10]*Forest Conservation Council v. U.S. Forest Serv.*, - Fed. Appx.-, 2006 WL 2844573 (9th Cir. October 5, 2006); *Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006); *Sierra Nevada Forest Prot. Campaign v. U.S. Forest Serv.*, 166 Fed. Appx. 923 (9th Cir. 2006); *Bear Creek Council v. Heath*, 153 Fed. Appx. 435 (9th Cir. 2005); *Cascades Wildlands Project v. Conroy*, 159 Fed. Appx. 769 (9th Cir. 2005) (aff'g district court); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144 (9th Cir. 2005); *Grant School Dist. No. 3 v. Dombeck*, 126 Fed. Appx. 823 (9th Cir. 2005); *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004); *Forest Conservation Council v. U.S. Forest Serv.*, 110 Fed. Appx. 26 (9th Cir. 2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089 (9th Cir. 2003); *Native Ecosystems Council v. U.S. Forest Serv.*, 54 Fed. Appx. 901 (9th Cir. 2003); *Forest Guardians v. Plant & Animal Inspection Serv.*, 309 F.3d 1141 (9th Cir. 2002); *Montana Snowmobile Ass'n v. Wildes*, 26 Fed. Appx. 762 (9th Cir. 2002).

the Forest Service.

In the rest of the country, the Forest Service record is far better. In the same period, the other 11 circuits decided 22 appeals of district court NEPA or NFMA rulings in Forest Service cases. At the district court level, the Forest Service prevailed in all 22 cases. On appeal, the citizen litigants were able to obtain reversals in seven cases,[11] while the Forest Service won affirmances in 16 cases.[12]

Thus, even though the Forest Service uniformly applied the same set of laws and regulations throughout the country, the agency lost 22 of 37 cases in the Ninth Circuit, but lost only seven times in 23 cases in the other 11 circuits. In both absolute numbers and proportions of adverse rulings against the Forest Service, the Ninth

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[11] *Ouachita Watch League v. Jacobs*, 463 F.3d 1163 (11th Cir. 2006); *Cherokee Forest Voices v. U.S. Forest Serv.*, 182 Fed. Appx. 488 (6th Cir. 2006); *Ecology Ctr. v. U. S. Forest Serv.*, 451 F.3d 1183 (10th Cir. 2006) (affirming dismissal on merits of NEPA claim but reversing and remanding on NFMA claim); *Utah Envtl. Cong. v. Bosworth*, 439 F.3d 1184 (10th Cir. 2006); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115 (2d Cir. 2005); *Utah Envtl. Cong. v. Bosworth*, 372 F.3d 1219 (10th Cir. 2004); *Northwoods Wilderness Recovery, Inc. v. U.S. Forest Serv.*, 323 F.3d 405 (6th Cir. 2003).

[12] *Northwoods Wilderness Recovery, Inc. v. U.S. Dep't of Agric. Forest Serv.*, -Fed. Appx.-, 2006 WL 2189118 (6th Cir. July 28, 2006); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732 (10th Cir. 2006); *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772 (10th Cir. 2006); *Allegheny Def. Project, Inc. v. U.S. Forest Serv.*, 423 F.3d 215 (3d Cir. 2005); *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532 (8th Cir. 2005); *Bensman v. U.S. Forest Serv.*, 408 F.3d 945 (7th Cir. 2005); *Wyoming Sawmills, Inc. v. U.S. Forest Serv.*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, -U.S.-, 126 S. Ct. 330 (2005); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428 (8th Cir. 2004); *Colorado Off Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130 (10th Cir. 2004); *Hannon v. Clark*, 70 Fed. Appx. 519 (10th Cir. 2003); *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851 (7th Cir. 2003); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003); *Citizens Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d1012 (10th Cir. 2002); *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205 (10th Cir. 2002).

Circuit is in a different legal universe than the rest of the country.[13]

*Amici* have no judicial recourse except this Court to curb the Ninth Circuit's aberrant environmental jurisprudence. The Ninth Circuit has never granted a request from the government or an industry intervenor for *en banc* review in an environmental case, despite many requests for it to do so.[14]

**B. The Ninth Circuit's new deference standard departs sharply from this Court's precedents.**

This Court has well-settled rules prescribing the deference a reviewing court undertaking traditional "arbitrary and capricious" review under the APA must give a federal agency's scientific judgments made while exercising authority assigned to it by Congress: When "analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh v. Oregon Natural Res. Council*, 490 U.S. at 378, quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). When a scientific determination is challenged, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). "When specialists express

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[13]Nor is the Forest Service in any way unique. The Ninth Circuit has reversed district court NEPA rulings in favor of other federal agencies or rejected agency NEPA analysis at least 16 times since 2002, at an increasing rate. *See, e.g., IlioUlaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 2006 (9th Cir. 2006) (Army must evaluate environmental effects of location for combat force battalion transformation); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006)(Bureau of Land Management NEPA analysis for mine permit approval did not individually discuss cumulative effect of each nearby mine); *San Luis Obispo Mothers for Peace v. Nuclear Reg. Com'n*, 449 F.3d 1016 (9th Cir. 2006) (Commission must evaluate risk of terrorist attack in environmental impact statement for nuclear plant licensing).

[14]It appears the Ninth Circuit has in its entire history granted *en banc* review in only one environmental case, reversing a panel decision in favor of a federal agency and granting relief to a conservation group that had sought *en banc* review. *The Wilderness Soc'y v. U.S. Fish and Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003), amended, 360 F.3d 1374 (9th Cir. 2004), vacating 316 F.3d 913 (2003).

conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council*, 490 U.S. at 378. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

The Ninth Circuit majority created and applied a completely new deference standard to the Forest Service decision in this case to proceed with a post-wildfire treatment project on the Lolo National Forest in Montana that includes "commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber in various areas of the forest." Pet. App. 3a. The majority's new deference standard disregards this Court's precedents and creates a direct conflict with nine other circuits. As the dissenting judge observed, the result of the majority's new deference standard is that the court "crossed the line from reviewer to decisionmaker." Pet. App. 26a. "[T]he majority changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." Pet. App. 28a. The dissenting judge also found that the majority's new standard "is contrary to the basic principle that we reverse agency decisions only if they are arbitrary and capricious," Pet. App. 36a, and concluded that "the majority has, in effect, displaced 'arbitrary and capricious' review for a more demanding standard." Pet. App. 27a.

The majority's new deference standard has two elements:

1. A reviewing court may give no deference to a predictive scientific judgment of Forest Service experts, including a judgment based on a computer model developed by Forest Service experts, unless the agency first validates the predictive scientific judgment through "on-the-ground" verification. Pet. App. 9a, Pet. App. 24a (describing elements of required validation process); and
2. A plaintiff is never required to meet any burden of proof,

either at the administrative level or in court proceedings, to obtain such non-deferential judicial review of a Forest Service decision. Pet. App. 7a.

Under its new deference standard, the majority found the Forest Service's predictive scientific judgments in this case are entitled to no deference, and the Forest Service decision based on those judgments is unlawful under NEPA and NFMA:

1. No "on-the-ground" verification means no deference to predictive scientific judgments. The Forest Service's scientific experts determined that the planned treatment would benefit certain "old-growth dependant species" found within the project area including the black-backed woodpecker. Pet. App. 6a-8a, 12a. The majority found the Forest Service decision unlawful because "the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis," Pet. App. 9a, and "NFMA 'require[s] that the hypothesis and prediction of the model be verified with observation.'" *Id.*, quoting *Lands Council v. Powell*, 379 F.3d at 752.[15] "While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any 'on the ground analysis' ...." *Id.* The majority held that no deference is due the agency's preference for the predictions of its own experts over opposing experts because none of the experts on either side had "studied the effects" of the proposed action, and since their disagreement only involves "differing hypotheses regarding the effects" of the proposed action, the agency experts should receive no deference. Pet. App. 10a-11a. A similar lack of deference led the majority to find the Forest Service decision unlawful under NEPA because the Forest Service environmental impact statement (EIS) treated the experts' prediction "as a fact instead of an untested and

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[15]The majority cited no specific section of NFMA that requires on-the-ground verification, but relied solely on the earlier Ninth Circuit *Lands Council* decision which also fails to cite any such section of NFMA. The court gave no deference to the Forest Service's contrary interpretation of NFMA that has long allowed reliance on models and predictions without on-the-ground validation, and the court failed to even acknowledge any need for such deference.

debated hypothesis." Pet. App. 12a.

The majority not only required the Forest Service to validate its predictions on-the-ground, but also dictated what information the Forest Service would need to validate the predictions, and required it to be "reasonably certain" of its conclusions:

> [O]ne must know where the threshold between "critical" and "sufficient" levels of burned habitat lies ... [and] how much further habitat levels have to drop before the species is downgraded from sensitive to threatened or how the Service plans to generate additional black-backed woodpecker habitat to counter-balance losses from salvaging, the passage of time, and ongoing fire-suppression efforts.

Pet. App. 16a-17a.

The majority also dictated the procedures the Forest Service must follow to support the required findings: 1) the Forest Service must make available to the public the data "from which a Forest Service expert derived her opinion," Pet. App. 17a, quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); 2) the agency's EIS must contain the most definitive information available on the viability issue or provide "a justification regarding why more definitive information could not be provided," Pet. App. 16a, quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998); and 3) the Forest Service must "undertake further scientific study" to resolve any scientific uncertainty unless "it explain[s] in the EIS why such an undertaking [wa]s not necessary or feasible." Pet. App. 12a, quoting *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993).

The majority also used the lack of on-the-ground validation as its basis for refusing to give any deference to spreadsheet computer models the Forest Service used to predict soil conditions in the areas to be treated: "The 'Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA.'" Pet. App. 20a, quoting *Lands Council v. Powell*, 379 F.3d at 752-53.

The dissenting judge sharply disputed the legal validity of the majority's "on-site spot verification" requirement:

> [T]here is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA.

Pet. App. 28a.

In explaining its lack of deference to Forest Service predictive judgments, the majority compared the decision to treat old-growth stands without prior on-the-ground effects verification to allowing "a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective." Pet. App. 9a. The dissenting judge challenged this analogy and the majority's new deference standard:

> [T]his analogy underscores the degree to which the majority inserts itself into the internal judgments of the Forest Service. The [Food and Drug Administration (FDA)] process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and medical devices. Neither NEPA nor NFMA serve that function in the environmental context. To import the notion of clinical trials from the FDA context to soil sampling in federal forests is a leap too far.

Pet. App. 36a. The dissenter concluded: "The majority's rationale cannot be reconciled with our case law requiring deference to an agency's technical expertise and experience, particularly with respect to questions involving engineering and scientific matters." Pet. App. 36a (citation and quotations omitted).

2. Plaintiff never has a burden of proof to show agency error in administrative or judicial proceedings. The majority acknowledged that plaintiff "Ecology Center does not offer proof

that the proposed treatment causes the harms it fears." Pet. App. 7a. Ecology Center did not challenge the agency's predictions or projections "at the administrative level," Pet. App. 29a, or offer "a credible scientific critique of the methodology" at any point. Pet. App. 32a. The majority nonetheless considered and accepted Ecology Center's argument on appeal, reasoning (with no cited authority) that Ecology Center's failure to meet any burden of proof was irrelevant because the Forest Service has an obligation to provide information in its environmental analysis demonstrating that its proposed project will benefit or be neutral to old growth dependent species. Pet. App. 7a-8a. Even with the conceded absence of any evidence contradicting the Forest Service's decision, the majority extended no presumption of regularity to the agency.

**B. The Ninth Circuit's new deference standard conflicts with established law from nine other circuits.**

1. Agencies may rely on models and other expert predictive methodologies without first conducting on-the-ground verification.

Unlike the Ninth Circuit in this case, other circuits recognize that scientific and technical predictions by their nature cannot be "verified" in advance, and commonly defer to agency reliance on predictive models and other predictive methodologies that have not undergone on-the-ground verification.

D.C. Circuit: "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise ... need not rest on pure factual determinations." *EarthLink, Inc. v. Fed. Communications Comm'n,* 462 F.3d 1, 12 (D.C. Cir. 2006) (italics and quotation omitted). Administrative agencies "'have undoubted power to use predictive models.'" *Appalachian Power Co. v. Envtl. Prot. Agency*, 249 F.3d 1032, 1052 (D.C. Cir. 2001), quoting *Small Refiner Lead Phase-Down Task Force v. Envtl. Prot. Agency*, 705 F.2d 506, 535 (D.C. Cir.1983). In using a predictive model, an agency has discretion to decide what data to collect, and may consider the "need to avoid an unyielding avalanche of information that might overwhelm the agency's ability to reach a

final decision" as well as the time and burden of "conduct[ing] full modeling with new data." *Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 71 (D.C. Cir. 2006).

First Circuit: An agency's use of a model (without on-the-ground verification of its predictions) to evaluate a combination of pollution control measures that are "novel" and "untested" is proper because "the Agency's choice of a model will be sustained if it bears a rational relationship to the characteristics of the data to which it is applied." *Sur Contra La Contaminación v. Envtl. Prot. Agency*, 202 F.3d 443, 448 (1st Cir. 2000) (quotation and citation omitted).

Fourth Circuit: An agency prediction using "recognized scientific models" together with a post-implementation monitoring program is a sufficient "hard look" under NEPA. *Hughes River Water Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999).

Fifth Circuit: "The court's role is to evaluate whether the [agency's] projections represent arbitrary or capricious exercises of its authority, not whether they are accurate." *BCCA Appeal Group v. Envtl. Prot. Agency*, 355 F.3d 817, 832 (5th Cir. 2003). "NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir.1974), *cert. denied*, 421 U.S. 994 (1975) and 422 U.S. 1049 (1975).

Sixth Circuit: "[If] the [agency's] judgment is a predictive one, it cannot necessarily be proven by the record." *Cellnet Communications, Inc. v. Fed. Communications Comm'n*, 149 F.3d 429, 441 (6th Cir. 1998).

Seventh Circuit: "[T]he Forest Service was entitled to use its own methodology to fulfill its obligations unless it was irrational." *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d at 863.

Eighth Circuit: "It is not for this court to second-guess what is the best method of determining [a relevant fact], nor is it this court's role to scrutinize the scientific value of the computerized model. ... The [plaintiffs'] bare assertion that the model was 'seriously flawed' is not a sufficient basis on which this court will disregard the agency's methodology." *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1130 (8th Cir. 1999).

Tenth Circuit: "Here, Ecology Center [the same group that is the respondent in this case] unpersuasively attempts to equate the lack of a 'hard look' with a lack of 'hard data.' Because the Forest Service has conformed with NEPA's procedural requirements, we will not second-guess the wisdom of the ultimate decision." *Ecology Ctr. v. U. S. Forest Serv.*, 451 F.3d at 1190 (citation and quotation omitted). "Courts are not in a position to decide the propriety of competing methodologies ... but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d at 782 (permissible for Forest Service to assume lynx are present in an area without conducting on-the-ground verification of assumption); *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1170-71 (10th Cir. 1999) (rejecting claim that Forest Service "made assumptions without the necessary background information and failed to make important viability findings").

Eleventh Circuit: An agency projection that is "primarily a question of probabilities [is] peculiarly subject to the expert experience, discretion, and judgment of the [agency]. In making a predictive judgment, the expertise of the [agency] supplements, and may supplant, the projections placed in the record by the parties. ... To hold otherwise would paralyze agencies merely because the future is not subject to proof." *Sunshine State Bank v. Fed. Deposit Ins. Corp.*, 783 F.2d 1580, 1582 (11th Cir. 1986) (italics, quotation and citation omitted).

2. Agency models and other expert predictive methodologies are entitled to particularly great judicial deference.

This court has clearly stated: "[A] reviewing court must [ascertain if] ... [an agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. at 103. In contrast to the Ninth Circuit, the other circuits have uniformly afforded agency scientific predictions and models the broad discretion commanded by this Court's precedents.

D.C. Circuit: "[W]e will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *Huls America, Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir.1996) (quotation and citation omitted). Especially great deference is due agency use of computer models because "their scientific nature does not easily lend itself to judicial review." *Appalachian Power Co. v. Envtl. Prot. Agency*, 135 F.3d 791, 802 (D.C. Cir. 1998).

Fourth Circuit: An agency's decision whether to rely on existing models or develop new models requires "most deferential" review. *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 237 (4th Cir. 2001)(quotation and citation omitted). "Agencies are entitled to select their own methodology as long as the methodology is reasonable. Courts must give deference to an agency's decision." *Hughes River Water Conservancy v. Johnson*, 165 F.3d at 289.

Sixth Circuit: "[U]nder the arbitrary and capricious standard of review, an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review." *Cellnet Communications, Inc. v. Fed. Communications Comm'n*, 129 F.3d at 441.

Seventh Circuit: "We give great deference to an agency's predictive judgments, especially those within the agency's field of discretion and expertise." *Western Fuels Inc. v. Interstate Commerce Comm.*, 878 F.2d 1025, 1030 (7th Cir. 1989) (citation and quotation omitted).

Tenth Circuit: "[R]eviewing courts should be particularly deferential when they are reviewing an agency's predictive judgments, especially those within the agency's field of discretion and expertise." *Franklin Savings Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1146 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992). An agency is only required to collect additional information for an EIS if that information is "essential to a reasoned choice among alternatives." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d at 172, citing 40 C.F.R. §1502.22(a).

3. A party challenging an agency decision has the burden of showing an error by the agency.

In conflict to the Ninth Circuit excusing Ecology Center from meeting any burden to show an error by the Forest Service either during administrative proceedings or in court, other circuits uniformly require a plaintiff to meet such a burden.

D.C. Circuit: " [T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof. ....[T]he burden is on petitioners to demonstrate that [the agency's] ultimate conclusion ... was unreasonable." *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271-72 (D.C. Cir. 2002) (quotations and citations omitted).[16]

Fifth Circuit: "It is the burden of the plaintiffs [under NEPA] to adduce evidence, not merely to make allegations or to rest on assumptions, establishing that the [agency] was [arbitrary and capricious] in reaching the conclusion it did." *Coliseum Square Ass'n, Inc. v . Jackson*, - F.3d -, 2006 WL 2664455 *9 (5th Cir. September 18, 2006) (quotation and citation omitted). "The plaintiffs had the burden of showing by a preponderance of the evidence that the defendants failed to adhere to the requirements of NEPA." *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 709 n. 9 (11th Cir. 1985).

Sixth Circuit: "[Plaintiff] has not proffered any evidence, either to us or to the [agency], that [an expected event] has a significant environmental impact. Its conclusory allegation is not sufficient [under NEPA] to withstand the [agency's] motion for summary judgment on this issue." *Commonwealth of Ky. ex rel*

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[16]The D.C. Circuit's decision in *Ne. Maryland Waste Disposal Auth. v. Envtl. Prot. Agency*, 358 F.3d 936, 948 (D.C. Cir. 2004) that in a formal rulemaking process the Environmental Protection Agency "must justify its basic assumptions even if no one objects during the comment period" does not support the Ninth Circuit's decision in this case. NEPA decisions are not formal rulemaking, and a duty to "justify basic assumptions" in a rulemaking is a far cry from a requirement for on-the-ground verification of agency models and predictions.

*Beshear v. Alexander*, 655 F.2d 714, 720 (6th Cir. 1981).

Seventh Circuit: In a NEPA case brought under the APA, "[t]he party challenging the agency action ... bears the burden of proof." *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

Tenth Circuit: Under NEPA, "the party challenging the agency's decision shoulders the burden of establishing that the [decision] was unreasonable." *Park County Res. Council, Inc. v. U. S. Forest Serv.*, 817 F.2d 609, 621(10th Cir. 1985), *overruled on other grounds, Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir.), *cert. denied*, 506 U.S. 817 (1992).

Eleventh Circuit: "We also cannot accept appellants' contention that the district court erred in placing on them the burden of introducing affirmative evidence in court to prove that the assumptions [in an EIS] were incorrect. As plaintiffs in the district court proceeding, appellants were required to establish by a preponderance of the evidence that the EIS was inadequate." *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1543 (11th Cir. 1990)(footnote omitted).

## CONCLUSION

For the foregoing reasons and those stated in the Petition, *amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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